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v. 2 -

REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, H. CADMAN JONES, AND R. HORTON SMITH, ESQS.,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

SMITH *v.* LEVEAUX.

1863. November 9. Before the LORDS JUSTICES.

A trading firm agreed to give to an agent a commission on orders obtained by himself, and a commission at a different rate on orders not obtained by him, but given by persons first introduced by him. *Held*, that the fact that the agent must in general be ignorant of the latter class of orders did not entitle him to file a bill against his principals for an account of what was due to him for commission, but that his remedy was at law.[1]

THIS was an appeal by the defendants from a decree of Vice-Chancellor WOOD, directing an account.

The defendants, who carried on business as wine-merchants in copartnership, entered into an arrangement with the plaintiff, that he should travel over a considerable district in England, to solicit orders for Hungarian wines and spirits, on the terms that he was

[1] See Navulshaw *v.* Brownrigg, 2 De G., M. & G. 441; Moxon *v.* Bright, L. R. 4 Ch. Ap. 292, 295; The South-Eastern Railway Co. *v.* Brogden, 3 Mac. & G. 8; Watford & Rickmansworth Railway Co. *v.* London & N. W. Railway Co., L. R. 8 Eq. 231; Flocton *v.* Peake, 12 W. R. 465; 10 L. T. N. S. 173; Hunter *v.* Belcher, *post*, 194; 10 Jur. N. S. 663; Hemings *v.* Pugh, 4 Giff. 456; 9 Jur. N. S. 1124; Kernot *v.* Potter, 3 De G., F. & J. 447; King *v.* Rossett, 2 Y. & J. 33; Freitas *v.* Dos Santos, 1 Y. & J. 574; Southampton Dock Co. *v.* Southampton Harbor & Pier Board, L. R. 11 Eq. 254; 1 Dan. Ch. Pr. (4th Am. ed.) 550, and note (3), 551, and note (3), and cases cited.

to receive a commission upon all orders obtained by him, or through his connection, and executed by the defendants, for wines and spirits.

No formal agreement was ever drawn up, but the terms on which the plaintiff for some time continued to act as traveller
* 2 to the defendants were contained in a * letter addressed to the plaintiff by a member of the defendants' firm, dated the 23d of July, 1860, which was in part as follows: —

"As regards the commission, I am most anxious that it should be as remunerative as possible, consistently with the successful working out of the business. To keep at our present prices in brandy, port, sherry, &c., I find it will not suit to allow a higher commission than the following, and particularly as I have had to give up a highly profitable portion of our business, so that I might have time to travel exclusively in the Hungarian wine trade. On all business done by yourself, either in London or your district, seven and a half per cent where our full prices and shipping arrangements are adhered to, and, of course, only on good debts, and an allowance of three and a half per cent on all orders received from your friends first introduced by you; so long as you continue to exert yourself in the working out of the business, and are engaged in the selling of our Hungarian wines and spirits, but of course we could not bind ourselves in perpetuity to such an allowance, as you might cease to represent these interests, and then, of course, the allowance would cease at the same time. Such a contingency I hope, however, is not likely to occur."

The plaintiff replied, accepting these terms. A few weeks afterwards, an agreement was come to, modifying these terms. The precise extent of the modification was in dispute, but according to the statements of the bill, it did not alter the main features of the agreement, that the plaintiff should receive a commission at seven and a half per cent on orders obtained by himself, and at three and a half per cent upon orders not obtained by himself, but coming from persons originally introduced by him.

* 3 * In September, 1861, the plaintiff ceased to travel for the defendants, and in January, 1862, filed his bill for an account and payment of what was due to him from the defendants in respect of his commission.

The Vice-Chancellor Sir WILLIAM PAGE WOOD held, that the case did not fall within the general rule, that an agent cannot maintain a suit against his principal for an account, inasmuch as here the defendants had agreed to pay the plaintiff three and a half per cent on orders not coming through the plaintiff, but coming from persons originally introduced by him, of which orders he would in general not know any thing. On this ground, his Honor considered the bill sustainable, and made a decree for an account. (*a*)

The defendants, who had by their answer alleged that the bill ought not to have been filed, and that the plaintiff's remedy was at law, appealed from this decree.

Mr. Willcock and *Mr. Roxburgh*, in support of the decree. — The defendants took upon themselves the duty of keeping accounts; and this created a confidential relation, which gives the plaintiff a title to relief in equity. The amount of the plaintiff's remuneration depends upon accounts of which the plaintiff could not know any thing; the defendants were therefore, in fact, his agents for the purpose of keeping them. The case is one in which it is impossible to obtain any remedy at law without the assistance of a Court of Equity, and is almost identical with that of partnership. The principle laid down in *The North Eastern Railway Company* v. *Martin* (*b*) supports our case.

* *Mr. Giffard* and *Mr. Jessel*, for the defendants. — The * 4 Vice-Chancellor has gone on the principle that an agent may maintain a bill for an account against his principal, wherever discovery from the principal is needed. This we submit is not law. *Phillips* v. *Phillips*, (*c*) *Padwick* v. *Stanley*. (*d*) There is no mutual account here; for that exists only where each party has paid and received on account of the other. *Foley* v. *Hill* (*e*) disposes of the argument founded on the fact that it was the duty of the defendants to keep an account; for beyond all question it is the duty of a banker to keep his customer's account; yet that case decides that a bill by the customer for an account will not lie. *Padwick* v. *Hurst* (*g*) proceeds on the same principle. There is

(*a*) 1 H. & M. 123.
(*b*) 2 Phill. 758, 762.
(*c*) 9 Hare, 471.
(*d*) 9 Hare, 627.
(*e*) 2 H. L. Cas. 28.
(*g*) 18 Beav. 575.

not alleged to be here any such complication as to bring the case within the exceptional class of cases in which an account has been decreed on that ground. The case here is one of contract, not of trust; and if this decree be sustained, it is difficult to say in what case of contract a bill for an account will not lie. The Vice-Chancellor in fact goes on the principle, that where there is a right to discovery a bill for relief will lie.

Mr. Willcock, in reply.

The Lord Justice Knight Bruce. — With unaffected deference to the Vice-Chancellor I must say, that, as it seems to me, this bill states a case for an action, but does not state a case entitling the plaintiff to file a bill in equity. It appears to me that the case stated is one merely of legal right, and that there is no account
* 5 or agency within the rules of Courts * of Equity. The bill, in my judgment, is demurrable, and ought now to be dismissed.

The Lord Justice Turner. — I should have hesitated before giving an opinion opposed to that of the Vice-Chancellor in this case, had not the course of the Court as to matters of account been more than once under my consideration, but as I have repeatedly considered the subject, I do not think that any advantage would arise from my deferring my judgment.

It has not been, and could not be, contended for the plaintiff that he could have any right to file a bill for an account, except on the ground that it was the duty of the defendant to keep accounts in respect of the orders obtained from his (the plaintiff's) friends and connections. But there is here no contract on the part of the defendant to keep an account of the orders so obtained, assuming that such a contract would entitle this Court to interfere, on which I give no opinion. There is here no more than a contract on the part of the defendant to pay a commission on such orders, and if such a contract gives a right to an account in equity, I do not see where the jurisdiction of the Court in matters of account is to stop. If this bill be maintained, it seems to me to follow as a necessary consequence, that every customer of every banker might maintain a bill against him for an account, which is directly opposed to the principles laid down by the House of Lords in

Foley v. *Hill.* (*a*) There are not in the present case any mutual accounts, nor is it alleged that there is any such complication of accounts as would render the interference of a Court of Equity necessary. With all deference to the Vice-Chancellor, I am of opinion that this bill ought to have been dismissed with costs.

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* SYKES *v.* SHEARD. * 6

1863. November 25. Before the LORDS JUSTICES.

A testator devised his real estate to trustees upon trust to sell and to hold the proceeds upon trusts for his children and their issue, subject to a proviso that no sale should be made without the consent of his sons and daughters. The testator left seven children, one of whom, a daughter, afterwards died, and her husband had become absolutely entitled to her share. The trustees, with the consent of the surviving children and of the husband of the deceased daughter, put up the estate for sale. *Held*, that the question, whether an effectual sale could be made without consent of all the seven sons and daughters, was too doubtful for the title to be forced upon a purchaser.[1]

THIS was an appeal by the plaintiffs from an order of the Master of the Rolls, dismissing their bill with costs.

The bill was a vendor's bill for specific performance, and the question was, whether a power of sale under the will of Edward Sykes was capable of being exercised, it being admitted that, if not, a good title could not be made.

Edward Sykes, by will dated the 19th of September, 1857, gave all his real estate and his residuary personal estate to the plain-

(*a*) 2 H. L. Cas. 28.

[1] See 1 Dart V. & P. (4th Eng. ed.) 67; Lewin Trusts (5th Eng. ed.), 317, 432; Alley *v.* Lawrence, 12 Gray, 374; 1 Sugden V. & P. (8th Am. ed.) 386, and note (*d*), and cases cited. But where trustees had power to sell with the consent of a majority of the testator's children then living, and all the children were dead, it was held there the trustees could execute the power by a sale, and make a good title. Leeds *v.* Wakefield, 10 Gray, 514; Williams *v.* Williams, 1 Duvall, 221. So where there was a power to sell with the consent of a majority of the testator's children, the consent of a majority of those living at the time of the sale was held sufficient, although one had died. Sohier *v.* Williams, 1 Curtis C. C. 479. See Barber *v.* Cary, 1 Kernan, 397; Norcum *v.* D'Oench, 2 Bennett (Mo.), 98.

tiffs, their heirs, executors, and administrators, upon trust to sell his real estate, together or in parcels, by public auction or private contract, and to convert and get in his residuary personal estate, or continue it in its present state of investment, and to invest the moneys arising from such sale and conversion in manner therein mentioned. "And as to the money to arise as aforesaid, and the stocks, funds, and securities whereon the same shall be invested, in trust for my sons and daughters, subject to the trusts hereafter contained; nevertheless I declare that no sale of my real or personal estate, or any part thereof, shall be made without the consent in writing of my sons and daughters also whether covert or sole; and that my said trustees or trustee, with such consent as aforesaid, shall have further a discretionary power to postpone, for such period as to them or him shall seem expedient, the con-
* 7 version or getting * in of my residuary personal estate." The testator then proceeded to declare that the unsold real estate and the outstanding personal estate should be subject to the same trusts as if converted, and the income thereof be deemed income for the purposes of the trusts, and the real estate be transmissible as personal estate. Then followed directions that the share of each son and daughter should be held in trust for him or her for life, with remainder in trust for his or her issue born in his or her lifetime as he or she should appoint, and in default of appointment, for such children of his or hers as should attain twenty-one, and in default of any child of such son or daughter attaining that age, then upon such trusts as such son or daughter should by will appoint, and, in default of appointment, for his or her next of kin. And the testator empowered his trustees, notwithstanding the trust for sale, in their discretion or at the request of the objects beneficially interested, to allot his real and personal estate, or any part or parts thereof, to any object or objects of the trusts thereinbefore contained in favour of his children and issue, in full or in part satisfaction of the share or respective shares of such object or objects under the same trusts, according to the value of the real and personal estate so to be allotted, such value to be ascertained in manner mentioned in the will.

The testator died in 1858, leaving seven children surviving him; all of whom attained twenty-one. All were living at the time of the institution of the suit, except Elizabeth Newlove, wife of

the plaintiff Richard Newlove. She had died in 1860, having made a will, in exercise of her power, bequeathing all her share under her father's will to her husband.

* The plaintiffs in 1862, with the consent of the six surviv- * 8 ing children, contracted to sell part of the real estate to the defendant, who refused to complete, on the ground that, after the death of Elizabeth Newlove, the trust for sale could not be exercised. The plaintiffs, thereupon, filed their bill for specific performance, which was dismissed with costs by the Master of the Rolls.

Mr. Southgate and *Mr. Dickinson*, for the plaintiffs, in support of the appeal. — The Master of the Rolls has decided that the consent required is that of all the sons and daughters, and that the death of one renders a sale impossible. The subject is discussed in Sugden on Powers. (*a*) The cases which are relied on against us are collected in the same work. (*b*) The first is *Danne* v. *Annas*, (*c*) but there the consent of a single person was required. In *Atwaters* v. *Birt*, (*d*) the persons were mentioned by name; and in Sugden on Powers (*e*) it is considered to make a material difference whether they are mentioned by name or by a general description, a view which is supported by *Vincent* v. *Lee*. (*g*) Lord ST. LEONARDS sums up the cases, Sugden on Powers, (*h*) and, according to his summary, if a dry common-law power had been given to the children themselves to sell, the survivors could have exercised it: *à fortiori* may an authority to consent be exercised by the survivors, where the fee is vested in trustees. *Mansell* v. *Mansell* (*i*) and *Green* v. *Green* (*k*) show that the Court will not be over-strict in the construction of powers of consent. As to the personal estate, the decision of the Master of the Rolls places us * in this dilemma, that there is no power either to * 9 sell or to postpone the sale, the same consent being required for either course. A probable view is, that the testator's intention was to make each child the protector of that child's own settled share. If so, the object is attained, for, with respect to the

(*a*) Page 126 (8th ed.).
(*b*) Page 252.
(*c*) Dyer, 219.
(*d*) 2 Cro. Eliz. 856.
(*e*) Page 126.
(*g*) Co. Litt. 113 *a*.
(*h*) Page 128 (8th ed.).
(*i*) Wilm. 36.
(*k*) 2 Jo. & Lat. 529.

share of the deceased daughter, that is vested in her husband absolutely, and he concurs in the sale. The trustees, clearly, can allot *in specie*, though one of the children is dead, and it is a most improbable intention to be ascribed to the testator, that he intended his trustees to have a power of partition, but not a power of sale.

[The Lord Justice Turner. — Might he not intend that the property should be sold if all the children agreed to it, but that if all did not agree to a sale it should be divided *in specie?*]

That does not agree with the general scope of the will, which points to a sale and a distribution of the proceeds. The trust is not limited to the lifetime of the children; yet, according to the view of the Master of the Rolls, it cannot be executed unless they are all alive. This view is most inconvenient, and one not to be adopted without necessity; and all the cases in any way bearing on the point are in our favour.

Mr. Selwyn and *Mr. T. C. Wright*, for the respondents, were not called upon.

The Lord Justice Knight Bruce. — Notwithstanding the case of *Vincent* v. *Lee*, (*a*) I am of opinion, that this title is much too doubtful to be forced upon a purchaser.

*10 *The Lord Justice Turner. — This case turns upon the construction to be put upon the words "consent in writing of my sons and daughters." Even if we were clearly of opinion that after the death of any of the sons or daughters the consent of the survivors would satisfy the words,[1] we could not feel any reasonable certainty that future Judges would be of the same opinion, in the event of the sale being hereafter impeached by any of the persons beneficially interested.

(*a*) Co. Litt. 113 *a*.

[1] See *ante*, 6 note (1).

THOMPSON *v.* CARTWRIGHT.

1863. November 25. Before the LORDS JUSTICES.

F. C. granted to D. an annuity of 139*l.* for five years determinable upon lives, and after the expiration of the five years an annuity of 199*l.* determinable on the same lives. T. C., as surety, by the same deed, secured the annuity on freehold land of his own, covenanting that it was free from incumbrances. The land was, in fact, subject to a mortgage to M. and others; its rental, apart from the incumbrance, was above 199*l.*, but, deducting the interest of the mortgage, was between 199*l.* and 139*l.* M., who was a solicitor, acted for all parties in the preparation of the annuity deed, but D. had no actual notice of the incumbrance.

Held, by the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls, the Lord Justice TURNER doubting, that the annuity deed did not require enrolment, for that T. C. was a grantee within the meaning of the Act 53 Geo. 3, c. 141, § 10, and that although the annuity must be taken to be of the larger amount, D. had not, within the meaning of the Act, "notice" of the mortgage, so that the yearly value of the land was sufficient.[1]

THIS was a motion to discharge an order of the Master of the Rolls, refusing to vary his chief clerk's certificate, allowing a claim by John Downes as a creditor under an annuity deed against the estate of Francis Cartwright. The case turned upon the question whether the annuity deed required enrolment.

By an indenture dated the 11th of March, 1828, made between Francis Cartwright of the first part, Thomas Cartwright of the second part, Arthur Downes of the third part, and John Howell of the fourth part, reciting the title of Thomas Cartwright to the fee-simple of a *moiety of certain lands, and a con- *11
tract for sale of an annuity by Francis Cartwright to Arthur Downes, Francis Cartwright in consideration of 1998*l.* granted to Arthur Downes an annuity of 139*l.* 17*s.* for five years, if four persons named or any of them should so long live, and from the end of the five years an annuity of 199*l.* 16*s.* for ninety-nine years, if the same four persons or any of them should so long live. Thomas Cartwright by the same deed charged his moiety of the above-mentioned lands with the payment of the annuity, and

[1] See 2 Dart V. & P. (4th Eng. ed.) 802, 803; Kerr F. & M. (1st Am. ed.) 258–262; Perry *v.* Holl, 2 De G., F. & J. 38 and note (1); 2 Sugden V. & P. (8th Am. ed.) 757; Austin *v.* Tawney, L. R. 2 Ch. Ap. 143.

covenanted that the moiety was free from incumbrances. This deed was not enrolled under the Annuity Act. (*a*)

The evidence established that the annual value of the moiety charged with the annuity slightly exceeded the annuity. Thomas Cartwright, however, had in February, 1826, mortgaged this moiety in fee for 1000*l*., so that the annual value, after deducting the interest, fell considerably short of the 199*l*. 16*s*., though it exceeded 139*l*. 17*s*. The mortgage was made to several persons, of whom Montriou, a solicitor, was one. Montriou acted as the solicitor both of Arthur Downes and Thomas Cartwright in the annuity transaction, but there was no evidence that Arthur Downes had any actual notice of the existence of the mortgage.

Thomas Cartwright died in 1837. Francis Cartwright died in 1863, having paid the annuity of 139*l*. 17*s*. until within six months of his death. An order having been made for administration of his estate, the personal representative of Arthur Downes claimed to prove as a creditor, some of the *cestuis que vie* named in the annuity deed being still living. The plaintiff, who was a creditor, opposed this claim, on the ground that the annuity deed was void for want of enrolment.

*12 *The Master of the Rolls was of opinion that Thomas Cartwright ought to be considered to be a grantor of the annuity within the meaning of the 53 Geo. 3, c. 141, § 10, as to bring the case within the saving of that clause, if the real estate was of sufficient value. His Honor held that, for the purpose of determining that question, the annuity must be treated as one of 199*l*. 16*s*., but that the annual value of the estate was sufficient, for that Arthur Downes could not be held to have had notice, within the meaning of the Act, of the existence of the mortgage. The plaintiff appealed.

Mr. Cole and *Mr. Hetherington*, for the appellant. — The Master of the Rolls was with us on the question, whether the annuity must, for the present purpose, be taken at the greater amount, and we need not say any thing on that point. But we submit that it was erroneous to hold that Thomas Cartwright can be considered a grantor of the annuity. He charged it on this particular estate, and so made it a security by way of suretyship,

(*a*) 53 Geo. 3, c. 141.

but he did not join in the grant, nor make himself in any way personally liable for payment. This distinguishes the case entirely from *Darwin* v. *Lincoln*, (*a*) where the surety joined in the grant. The policy of the Act was, that persons who borrowed money in this improvident way might be prevented from doing it secretly. An exception was made where the annuity is secured by real estate of the grantor of sufficient value, because in that case he is only incumbering the income of his realized property; but that the annuity is secured on the real estate of another person who comes in as surety does not in any way alter the position of the borrower, or make it less necessary that a transaction which tends to make him unable to meet his engagements should be *made public by enrolment. But if we fail on this *13 ground, we contend that Arthur Downes had notice of the mortgage within the meaning of the Act. The Master of the Rolls relied on the *dicta* of Lord BROUGHAM in *Kennedy* v. *Green*. (*b*) In that case Sir J. LEACH held that the client was affected by notice, and Lord BROUGHAM affirmed the order, so that the doctrine laid down by him was not necessary to the decision. We submit that his limitation of the doctrine of notice is not sound. His Lordship puts the doctrine, that the knowledge of the solicitor is the knowledge of the client, on the foundation that the solicitor is supposed to tell his client what he knows. According to this rule, if a solicitor while negotiating a mortgage to his client were to receive written notice of a prior incumbrance, evidence would be receivable to show that he never told his client. We submit that the doctrine is not founded on a presumption of this kind, but on the principle that, as the solicitor represents the client in the transaction, notice to the solicitor is actual notice to the client, as is laid down in *Espin* v. *Pemberton*. (*c*) The case is one clearly within the mischief intended to be guarded against by the Act, for if this annuity had been registered, persons would not have trusted the grantor.

Mr. John Pearson, in support of the order of the Master of the Rolls. — The object of the Act was to protect persons likely to be imposed upon in such transactions. The 10th section excepts several cases, all being cases in which the legislature might rea-

(*a*) 5 B. & Ald. 444.
(*b*) 3 M. & K. 699.
(*c*) 3 De G. & J. 547.

sonably consider that there was no fear of fraud or oppression.

Ex parte Mitchell (*a*) clearly lays down the doctrine that
* 14 secured annuities were * excepted because a grantee who could give such security was in a position to make a fair bargain, and the same doctrine is laid down in *Darwin* v. *Lincoln*. (*b*) It cannot, then, make any difference whether the land belongs to the borrower or to a surety who secures the annuity on it, or, if there be a difference, it is in our favour. It is then required that the land should be of sufficient value after allowing for incumbrances of which the grantee has notice. As to the value, the grantee has means of knowledge, and it is on him to prove the sufficiency of the value. But as to notice of incumbrances, that is to be proved against him, and if the grantor suppresses an incumbrance, that ought not to turn to the prejudice of the grantee. The great thing is, was the grantee placed in such a situation as to be able to impose his own terms? Now, an incumbrance of which the grantee did not know could not affect the negotiation; "notice," therefore, in the Act must mean actual not merely constructive notice, and actual notice is not alleged in the present case. But I say that, assuming personal notice not to be necessary, there was no notice of any kind here. I do not rely on *Kennedy* v. *Green*, because, in that case, there was fraud apart from the concealment, here not; but I rely on the principle of *Jones* v. *Smith* (*c*) and *Hewitt* v. *Loosemore*. (*d*) On that principle there was not here any constructive notice of the incumbrance, for the covenant in the deed amounted to a representation, which the grantee was justified in believing, that there was no incumbrance. But if there was notice, I submit that the annuity ought not to be taken at the larger amount. The future annuity might never have come into existence, for the power of repurchase might have been exercised, or all the lives have dropped before the
* 15 * time limited for its commencement. The time of granting the annuity is the time to be looked to; the question is, are the rents sufficient then to pay it. The Act does not refer to future annuities. It is said that this construction would open a door to fraud, but if the Act does not shut the door close enough it is for the legislature to supply the defect.

(*a*) 2 East, 138.
(*b*) 5 B. & Ald. 444.
(*c*) 1 Phill. 244.
(*d*) 9 Hare, 449.

Mr. Cole, in reply. — The Act does not say that the notice must be actual notice or personal notice, and it must be considered to have been framed with due regard to the decision in *Le Neve* v. *Le Neve*, (*a*) as to what amounts to notice. *Fuller* v. *Bennett* (*b*) is against the respondent on the question whether there was constructive notice.

THE LORD JUSTICE KNIGHT BRUCE. — In this case the first question to be answered is, whether, on the assumption that the point as to value ought to be decided in favour of the respondent, the lands subjected to the annuity are lands coming within the meaning of the words "lands of equal or greater value than the said annuity, over and above any other annuity and the interest of any principal sum charged or secured thereon of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee-simple or fee-tail in possession." Assuming, as I have said, the question of value to be with the respondent, it is plain that if Thomas Cartwright had been clearly the grantor of the annuity in every proper sense of the expression, the case would have been brought within the exception in the Act. But it is said that he was not the grantor, that Francis Cartwright was the
* grantor, and Thomas Cartwright only his surety, as he did * 16
not join in the grant nor make himself personally liable. Thomas Cartwright was, however, a party to the deed by which it was granted, and by that same deed made his lands subject to the annuity. In these circumstances it would, in my opinion, be not only an illiberal and narrow, but an erroneous, interpretation of the Act to hold these lands not to be within the exception, though in a sense Thomas Cartwright was not the grantor of the annuity.

Then, as to the question of value, I agree with the argument for the appellant, that the greater amount of annuity is to be considered, without regard to the annuity of less amount, or the less amount of annuity, which was to be paid for a certain time. I am satisfied, however, that, apart from the mortgage, the value of the lands was sufficient; and this, in my opinion, reduces the controversy to the point, whether of that mortgage the grantee had notice within the meaning of that term as used in the Act. The case stands thus: Downes knew nothing of the mortgage. The

(*a*) 3 Atk. 360. (*b*) 2 Hare, 394.

mortgage was made to Montriou and two other persons. Montriou, a solicitor, was engaged as solicitor in the matter of the annuity transaction, engaged as solicitor for the grantee, and for the grantors, if there were two grantors. It is said, then, that because he being mortgagee knew of the mortgage, though he suppressed it, yet within the meaning of this section the grantee had notice, for that the knowledge of Montriou was his knowledge. I think this an improper construction of the word "notice" in the section, and therefore on the assumption, which I think a right assumption, that the greater amount of annuity is to be taken, I am of opinion that the value of the lands was sufficient. The appeal is against reason and justice, and should, in my judgment, be dismissed with costs.

*17 *THE LORD JUSTICE TURNER.—As my learned brother agrees with the Master of the Rolls, it is not necessary for me to give any opinion on the case. I do not express any dissent from his view, but merely give no opinion. The appellant, failing in his appeal, must pay the costs, for whatever be the legal rights of the parties, the truth and honesty of the case are with the respondent.

In the Matter of DE VISME, a Person of Unsound Mind;
AND
In the Matter of The TRUSTEE ACT, 1850.

1863. December 4. Before the LORDS JUSTICES.

A married woman, living separate from her husband, invested in the names of her son and daughter moneys arising from savings of her separate estate. The mother died appointing her daughter her executrix. The son having become lunatic, a transfer to the daughter as executrix was ordered on petition without a bill.

THIS was a petition by the sister of a lunatic, asking a transfer to herself, as executrix of her mother, of a sum of stock standing in the joint names of herself and the lunatic.

The mother of the petitioner was a lady entitled to separate estate, the savings of which she had invested in the purchase of

stock in the joint names of her son and daughter. She was separated from her husband at the time when the investments were made, and the object of making them in the names of her son and daughter was alleged by the petitioner to be the securing the funds from the control of her husband.

The mother had died appointing the daughter her executrix, and the son having become a lunatic, the daughter presented this petition.

* *Mr. George Lake Russell*, for the petitioner. — In *Re* * 18 *Collinson*, (*a*) where a father had made investments in the name of his son, Lord CRANWORTH, though he held them not to be intended as an advancement, declined to act upon that view without a bill being filed. I submit, however, that such a course is not necessary here, there being no presumption that a purchase by a mother in the name of a child is intended for an advancement, though such a presumption does arise where the purchase is made by a father.

Their Lordships made the order.

JOHNSON *v.* WYATT.

1863. November 9, 18, 20. December 17. Before the LORDS JUSTICES.

The defendant on the 28th of March called on the plaintiff, who occupied a house adjoining his, and informed her that he was going to erect a photographic studio on a building at the rear of his premises, and that plans had been prepared. The plaintiff under a misunderstanding as to the spot where the studio was to be erected made no objection, and did not ask to see the plans. On the 8th of April, the workmen commenced operations. The actual erection of the studio began on the 16th, and the first complaint was made verbally on the 24th, by which day considerable progress had been made in the building. On the 28th a formal written complaint was made, and on the 5th of May the plaintiff filed her bill for an injunction and damages, alleging obstruction of air and light. The bill was dismissed with costs by the Vice-Chancellor on the ground of delay and acquiescence.

Held, that although there had been sufficient acquiescence to justify the Court

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(*a*) 3 De G., M. & G. 409; [note (2), and cases].

in refusing an injunction on interlocutory application,[1] there had not been such acquiescence as to justify the dismissal of the bill on that ground.[2]

The case for an injunction failing, whether under 25 & 26 Vict. c. 42 (Mr. Rolt's Act), it was obligatory on the Court to decide upon the question of damages, *quære*.

Held, however, that the case was one in which the Court ought to exercise the jurisdiction given to it by the Stat. 21 & 22 Vict. c. 27 (Sir H. M. CAIRNS'S Act), and determine whether the plaintiff was entitled to any and what damages.[3]

THIS was an appeal by the plaintiffs from an order of Vice-Chancellor WOOD dismissing their bill.

Mrs. Johnson, one of the plaintiffs, was the lessee, under *19 the Marquis of Westminster, of a house in North * Audley Street, and Mrs. Burke, the other plaintiff, was the underlessee and occupier. The defendant was the occupier of an immediately adjoining house, in the same street, and was a photographic artist. In the spring of 1863, the defendant proposed to erect, on an outbuilding standing towards the rear of the premises in his occupation, a glass-room for the purposes of his business. On the evening of the 28th of March, after sunset, the defendant called at the plaintiff's house and saw Mr. Burke, a son of Mrs. Burke, who lived at the house with his mother. They went together into a room at the back of the plaintiff's house, and the defendant explained to Mr. Burke the character of the proposed erection, and pointed out its situation, so far as this could be done in the dark. There appeared to have been some misunderstanding at this interview, for Mr. Burke positively deposed that he understood the defendant to say that the erection was to be raised on an outbuilding which was only one story high, whereas the intention was to erect it on a building two stories high. Mr. Burke made no objection to the proposed structure. The defendant informed him

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1663; Great Western Railway Co. *v.* Oxford, Worcester and Wolverhampton Railway Co., 3 De G., M. & G. 341, 359, and cases in notes; Attorney-General *v.* Sheffield Gas Consumers Co., 3 De G., M. & G. 304, and cases in notes; Coles *v.* Sims, 5 De G., M. & G. 1, and note (1); Graham *v.* Birkenhead, &c., Railway Co., 2 Mac. & G. 146, and cases cited in note (2); Kerr Inj. 201, 202; Imperial Gas Light and Coke Co. *v.* Broadbent, 7 H. L. Cas. 611.

[2] See Kerr Inj. 205, 226, 227; Senior *v.* Pawson, L. R. 3 Eq. 330.

[3] See Young *v.* Fernie, 1 De G., J. & S. 353; 2 Dan. Ch. Pr. (4th Am. ed.) 1071, 1081, and cases in notes; Durell *v.* Pritchard, L. R. 1 Ch. Ap. 244; Senior *v.* Pawson, L. R. 3 Eq. 330.

that he had entered into a contract with a builder, and that the builder had prepared a plan of the erection; but Mr. Burke, being satisfied with the explanations given by the defendant, who at the same time said that the erection was one which would not prejudicially affect the plaintiff's property, did not ask to see the plan.

On the 8th of April, the defendant's workmen commenced operations, and on the 16th, the erection of the glass building itself began. Mrs. Burke deposed that she was not aware until the 24th that the structure was to be raised on the two-story building, and not on the building one story high. On the 24th of April, by which day considerable progress had been made, Mr. *Burke remonstrated, and on the 28th wrote to the *20 defendant a formal letter of remonstrance, stating that unless the erection on the two-story building was abandoned, legal proceedings must be taken. It was not shown that Mrs. Johnson knew any thing of what was going on till the 30th of April; the bill alleged that she did not, but there was no evidence on the point one way or the other. The defendant continued his works, and on the 5th of May the structure was almost completed.

On the last-mentioned day, the plaintiffs filed their bill, praying for an injunction to restrain the defendant from proceeding with the erection of the glass house on the two-story building, and from otherwise using the two-story building for the purpose of constructing thereon any other erection or building, or otherwise from proceeding with any works upon or in connection with the outbuildings and back premises so as to obstruct or diminish the access of light and air to the windows at the back of the plaintiff's house, or any of them, or as otherwise to interfere with the healthy or comfortable use or enjoyment, or market value, of the plaintiff's house, and from allowing to continue so much of the erection as should have been completed, or any erection or building connected therewith, in such a state, and from making use of the same as a photographic studio, or otherwise so as to produce the above injurious effects. The bill also prayed, that the plaintiffs respectively might have damages awarded to them in respect of the injury sustained, and the expenses incurred by them, in consequence of the acts of the defendant, and that the defendant might be decreed to pay the sum so awarded.

The plaintiffs moved for an injunction, and it was arranged that the motion should stand over and be *treated as a *21

motion for decree. On the 26th of June, 1863, the motion was disposed of on that footing. His Honor considered that there had been no misrepresentation on the part of the defendant, that there had been negligence on the part of the plaintiffs in not asking to see the plan, and still more so in not interfering or remonstrating until the building had proceeded so far; and that the plaintiffs were, therefore, debarred, by acquiescence, from all right to an injunction. As to damages, his Honor considered that the remedy was at law, and that a Court of Equity could not interfere, and he accordingly dismissed the bill with costs.

The plaintiffs appealed.

Mr. Willcock and *Mr. J. Napier Higgins*, for the appellants.—The right of the appellants to relief cannot be barred by such delay as has taken place here. Though mere delay of no long continuance will take away the right to an interlocutory injunction; yet delay will not have that effect at the hearing, unless it be such delay as to amount to an acquiescence extinguishing the right. *Gerard* v. *O'Reilly*. (*a*) Moreover, the case of acquiescence is made against Mrs. Burke alone. Mrs. Johnson knew nothing till the 30th of April, and the bill was filed on the 5th of May; so that no delay can be imputed to her. The Chancery Amendment Act (15 & 16 Vict. c. 86), § 49, does away entirely with the effect of misjoinder of plaintiffs: *Clement* v. *Bowes*; (*b*) *Pollock* v. *Lester*; (*c*) so that Mrs. Johnson must have relief, whatever case of acquiescence be made out against
* 22 Mrs. Burke. But as regards Mrs. Burke, we submit * that the doctrine laid down by the Vice-Chancellor is unsound. It would be most dangerous to hold, that if my neigbour informs me that he is going to erect a building which will do no harm to my property, I lose all right to complain if I do not at once proceed to make full inquiry and inspect the plans, before the building makes any progress. We submit that in such a case, the person to whom the representation is made is justified in relying upon it until he sees that it is incorrect. The damage to our property is sufficient to entitle us to an injunction. *Wilson* v. *Townend*, (*d*) *Attorney-General* v. *Nichol*, (*e*) *Walter* v. *Selfe*. (*g*)

(*a*) 3 Dru. & War. 414, 433.
(*b*) 1 Drew. 684.
(*c*) 11 Hare, 266; see p. 274.
(*d*) 1 Drew. & Sm. 324.
(*e*) 16 Ves. 338.
(*g*) 4 De G. & Sm. 315, 322.

The case is one in which damages ought to be given, if an injunction is not granted. *Wedmore* v. *Mayor, &c. of Bristol.* (*a*) Under Sir H. M. CAIRNS's Act (21 & 22 Vict. c. 27), § 2, the Court can give damages; and Mr. Rolt's Act (25 & 26 Vict. c. 42) in effect makes the former Act imperative, for it forbids sending the plaintiffs to law.

Mr. Daniel and *Mr. Goldsmith*, for the defendant. — The case is not one in which the Court will interfere. The access of light and air to the plaintiff's property is no doubt in some degree interfered with, but not to such a degree as to be actionable. The real ground of complaint, is the setting up a photographic establishment next door; but the making a neighbourhood less fashionable by setting up a trade in it is not a ground of action. There has been no bad faith on the part of the defendant; he acted openly; and the plaintiffs were to blame for not making further inquiry. The Stat. 15 & 16 Vict. c. 86, § 49, does not contemplate such a case as this. Under Mr. Rolt's Act, the question * of * 23 damage may be left to be tried at law, where it can be much better tried. If there is no case for an injunction, the matter is improperly brought into equity within the meaning of the 4th section of that Act.

Mr. Willcock, in reply. — Sir H. CAIRNS's Act is not obligatory; but it makes the question of damages one proper to be tried in equity. Then, Mr. Rolt's Act obliges the Court to decide every question of law or fact that comes before it. The exceptions in the 4th section does not touch the present case. "Improperly brought into equity," must refer to a case which was of such a nature that relief ought not to have been sought in equity, not to every case in which a plaintiff fails to establish his right in equity. *Baylis* v. *Watkins, Re Hooper.* (*b*) As to acquiescence, the person relying on it must prove knowledge. We do not allege fraud, but there was a misunderstanding; and the defendant cannot prove what he is bound to prove, that we knew what he was going to do, and made no objection. As to the progress of the work before we complained, it cannot be held that Mrs. Burke was bound to be on

(*a*) 11 W. R. 136, V. C. S.

(*b*) 11 W. R. 130, 8 Jur. N. S. 1165, L.JJ.; 32 L. J. Ch. 55, to be reported in De Gex, Fisher, & Jones.

the lookout, so as to become acquainted with the objectionable character of the proposed erection at the very first moment at which its position became discernible.

Judgment reserved.

December 17.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, but for a recent statute, the contents of which I had not at the hear-
* 24 ing fully and accurately * recollected until the argument for the plaintiffs (the appellants here) had proceeded some way, I should, probably, have thought it better that, without dismissing the bill, for the present at least, the cause should stand over, with liberty for the plaintiffs or either of them to sue the defendant at law, and with liberty to apply. But we must have regard to the present state of the statute law.

With unaffected deference to the eminent Judge from whose Court the suit comes, my impression is that a case of acquiescence or of laches has, upon the whole evidence, not been established against either of the two plaintiffs, whose bill was filed on the 5th of May last. If, therefore, the addition to the defendant's house against which complaint is made is a nuisance to the plaintiffs' house, or to the plaintiffs in respect of their house, they are, as I consider, entitled to relief here. On the materials before us, however, I am of opinion that it is not shown to be a nuisance to them or their house as to either air or light. If, therefore, the case is to rest as it is, the bill should, I think, remain dismissed. But I should have been willing, had my learned brother been willing, if asked by the plaintiffs, to allow the parties to examine or re-examine witnesses orally here on the question of nuisance, with a view to granting or refusing finally, so far as we are concerned, an injunction. The Lord Justice, however, being of opinion that the bill ought to remain dismissed without any such option as I have mentioned, so it will be; and he is, I need not say, very likely to be right.

The bill standing dismissed, I agree with him in opinion that the defendant should neither receive nor pay any costs previous or subsequent to the appeal.

* 25 * The Lord Justice TURNER, after stating the prayer of the bill, proceeded as follows: —

Upon the hearing of the cause the Vice-Chancellor Sir WM. PAGE WOOD dismissed the bill with costs, upon the ground of the plaintiffs having debarred themselves of any title to relief by having permitted the defendant to go on with the building, which, in fact, was nearly completed before the bill was filed. The plaintiffs have appealed from the decree dismissing the bill, and we have now to dispose of the appeal. My learned brother and I are agreed in opinion that this decree cannot be maintained upon the ground on which the Vice-Chancellor has proceeded. That there was sufficient acquiescence to justify the Court in refusing to grant the injunction upon an interlocutory application cannot, I think, be doubted; but I apprehend that to justify the Court in refusing to interfere at the hearing of a cause there must be a much stronger case of acquiescence than is required upon an interlocutory application, for at the hearing of a cause it is the duty of the Court to decide upon the rights of the parties, and the dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and for ever lost.

This case, therefore, must, in my opinion, be disposed of on the merits, and the first question on the merits must be whether the injunction ought to be granted either to the full extent of the prayer or to any more limited extent. This question depends, I think, upon the degree in which the light and air coming to the plaintiffs' house is or will be obstructed by the erection in question. It is scarcely necessary to say that this Court certainly would not interfere by way of injunction in a case in which no damages could be recovered at law. * Perhaps it may be said that this * 26 Court would not so interfere in a case in which although damages might be recoverable at law the amount to be recovered would be trifling and inconsiderable, but as this is a question on which, as applying to cases of nuisance, there has not been an unanimity of opinion in the Court, I leave that point untouched. I think that, at all events, a plaintiff coming to this Court for its interference in a case of this nature is bound to show that the obstruction to the light and air which he calls upon the Court to prevent is such as will render the house occupied by him, if not of less value, less fit, or at least substantially less comfortable, for the purposes of occupation.[1]

[1] See Clarke *v.* Clark, L. R. 1 Ch. Ap. 16; Yates *v.* Jack, L. R. 1 Ch. Ap. 295; Butt *v.* Imperial Gas Co. L. R. 2 Ch. Ap. 158; Beadel *v.* Perry, L. R.

How then does this case stand upon the evidence as to these points? I think it clear upon the evidence, that if the plaintiffs' case can be sustained at all as to any of these points, it can only be with reference to the windows of the bedrooms on the second and third floor, and the staircase window between those floors; but looking to the whole of the evidence before us, and not to that on the part of the plaintiffs only, I think that even with respect to these windows the plaintiffs have failed to establish a case on any of these points entitling them to call for the interposition of this Court by way of injunction. First, as to the light and air. These windows are in a lateral position with reference to the proposed erection. There is light and air coming to them from other quarters than over the two-story building. I do not find any evidence on the part of the plaintiffs that there will not be light and air coming to them from these other quarters sufficient for all ordinary purposes of domestic comfort and enjoyment, and so far as the access of air may be obstructed, the obstruction will, as I collect from the evidence, be casual and temporary only, *27 depending on the direction of the wind. *Secondly, as to the effect of the proposed erection on the value of the house, it is to be observed that these windows are merely the upper windows at the back, and it is remarkable that although most of the plaintiffs' witnesses say that the house will be diminished in value by the proposed erection, scarcely any of them, I believe only one, or, at most, two of them, refer this diminution in value to the alleged diminution of light and air. That the windows of the house may be overlooked, and its comparative privacy destroyed, and its value thus diminished by the proposed erection (circumstances to which some of the plaintiffs' witnesses refer), are matters with which, as I apprehend, we have nothing to do.[1] I think, therefore, that the plaintiffs' case for the injunction wholly fails.

Then as to the question of damages. Upon the best consideration which I have been able to give to the Chancery Regulation Act, 1862, 25 & 26 Vict. c. 42 (Mr. Rolt's Act), I am not satisfied that under the provisions of that Act we are absolutely bound to

3 Eq. 465; Martin *v.* Headon, L. R. 2 Eq. 425; Tapling *v.* Jones, 11 H. L. Cas. 290; Fifty Associates *v.* Tudor, 6 Gray, 255; 2 Dan. Ch. Pr. (4th Am. ed.) 1638, and cases in note (2); Kerr Inj. 352, 353, 354.

[1] See Tapling *v.* Jones, 11 H. L. Cas. 290.

enter into this part of the case, for I much doubt whether the question as to the plaintiffs' right to damages ought to be considered as being, within the meaning of the Act, a question of law or fact cognizable in a Court of Common Law, on which the plaintiffs' title to relief in equity depends; but Sir HUGH CAIRNS's Act (21 & 22 Vict. c. 27) has, I think, given us jurisdiction to entertain this question of damages; and having regard to the spirit and intention of the later Act (the Chancery Regulation Act), I think that having this jurisdiction we ought, under the circumstances of this case, to exercise it. I have, therefore, considered the question of damages, and looked into several cases at law upon this subject. *Back* v. *Stacey*, (*a*) *Parker* v. *Smith*, (*b*) *Pringle* v. * *Wernham*, (*c*) *Wells* v. *Ody*. (*d*) Upon the au- * 28 thority of those cases my opinion is, that the plaintiffs have not established a sufficient case to entitle them to any damages, and that their case fails on this point also. Upon the whole, therefore, I think that this bill has been properly dismissed, although not upon the ground on which the Vice-Chancellor proceeded; but I think that under the circumstances of the case the bill should have been dismissed without costs, and there should be no costs of the appeal.

GREENWOOD *v.* GREENWOOD.

1863. November 14, 16, 17, 18. December 17. Before the LORDS JUSTICES.

In order that a transaction not otherwise valid may be supported upon the ground of its being a family arrangement, there must be a full and fair communication of all material circumstances affecting the subject-matter of the agreement which are within the knowledge of the several parties, whether such information be asked for by the other parties or not.[1]

(*a*) 2 C. & P. 465.
(*b*) 5 C. & P. 438.
(*c*) 7 C. & P. 377.
(*d*) 7 C. & P. 410.

[1] See Smith *v.* Pincombe, 3 Mac. & G. 653, note (1), and cases; 1 Sugden V. & P. (8th Am. ed.) 276, and cases in note (*q*); Baker *v.* Bradley, 7 De G., M. & G. 597, and cases in notes (2) and (3); Jenner *v.* Jenner, 2 De G., F. & J. 359, and cases in note (1); Wright *v.* Vanderplank, 8 De G., M. & G. 133, and notes; 2 Dart V. & P. (4th Eng. ed.) 689, 690; Kerr F. & M. (1st

THIS was an appeal by the defendant George Oates Greenwood from part of a decree of Vice-Chancellor KINDERSLEY setting aside an agreement of the 9th of April, 1851, an indenture dated the 11th of the same month, and an award and deed of the year 1853, relating to the estate of James Dent Greenwood.

The plaintiffs, the defendant G. O. Greenwood, and some of the other defendants, were, in April, 1851, the only surviving brothers and sisters of Joseph Hugh Greenwood, who had died in New Zealand in October, 1848, and of J. D. Greenwood, who had died at Sydney on the 13th of November, 1850.

Joseph H. Greenwood and James D. Greenwood, and the defendant Geo. O. Greenwood, had formerly been partners in a mercantile business, carried on both in England and New Zealand; and some time previous to 1843 they had embarked in the business of
* 29 sheep and * cattle farming in New Zealand; George O. Greenwood living at Bradford in Yorkshire, and the other two partners in New Zealand. In 1843, Joseph retired from the partnership, and the other two partners having purchased his share continued the business till the death of James D. Greenwood. In the year 1847, however, James D. Greenwood and George O. Greenwood entered into another partnership with Joseph H. Greenwood in the business of sheep and cattle farming in New Zealand, which partnership continued till the death of Joseph H. Greenwood in 1848, from which time this business also was carried on by George O. Greenwood and J. D. Greenwood in partnership until the death of the latter.

Upon the tidings of the death of James D. Greenwood reaching England, and while his surviving brothers and sisters were ignorant of the contents of any will which he might have made, an agreement of the 9th of April, 1851, was come to between the surviving brothers and sisters, the husbands of two of the sisters who were married being also parties. This agreement related to the estates both of J. H. Greenwood and J. D. Greenwood. So far as related to the estate of J. D. Greenwood, it was as follows: —

"That whatever devises and bequests are contained in the will or codicil of the said James Dent Greenwood, whether prepared in

Am. ed.) 124, 125, 434; 1 Story Eq. Jur. §§ 113, note (4), 129, 132, 132 *a*, 217; Persse *v.* Persse, 7 Cl. & Fin. (Am. ed.) 280 note and cases cited; Stewart *v.* Stewart, 6 Cl. & Fin. (Am. ed.) 911, and note (1).

England or elsewhere, shall be and they are hereby modified and agreed to be divided between the said parties hereto, share and share alike without any one being entitled to any larger sum than the other; and that this provision shall extend to and include the real and personal estates of the said Joseph Hugh Greenwood and James Dent Greenwood, whether in England, New Zealand, or elsewhere, subject to the payment of their debts and trust expenses; and all * Courts of Justice and all persons whom- * 30 soever are hereby indemnified in carrying this arrangement into effect."

On or about the same day an agreement was come to between the same parties for the purchase by the defendant George O. Greenwood, for 500*l.*, of the shares of the other surviving brothers and sisters in the property of J. H. Greenwood and J. D. Greenwood in New Zealand, except any moneys which J. D. Greenwood might have had at the time of his death in any of the banks in Australia or New Zealand, and the unpaid purchase-money due from the purchaser of a cattle station which had been sold, which moneys were to be divided among the parties in manner provided by the former agreement.

This agreement for purchase was carried out by an indenture dated the 11th of April, 1851, by which, in consideration of 500*l.* paid to them by G. O. Greenwood, the other surviving brothers and sisters, with the husbands of the married sisters, granted and assigned to G. O. Greenwood, his heirs, executors, administrators, and assigns, all their rights, shares, and interests, present or reversionary, and all other their right, title, share, and interest whatsoever in the property and effects given and bequeathed, and to which they or any of them were or might become entitled under the wills of J. H. Greenwood and J. D. Greenwood or either of them, or under any letters of administration, order of Court, or by any other means or in any other manner, whether situate in or near Wellington, or in or near Komenton, or wherever else in New Zealand, and whether the property of the two deceased as partners or as private individuals or otherwise howsoever within the colony of New Zealand, and all benefit and interest present and future, and all other their moneys and property in New Zealand which might * accrue to the assigning parties or any of * 31 them under the said respective wills, or by any other means

whatsoever. This deed contained a covenant by G. O. Greenwood to divide the moneys in the banks and the purchase-moneys of the cattle station (which as mentioned above had been excepted from the purchase) in manner provided by the agreement of the 9th of April.

Some time after the date of the last-mentioned deed intelligence reached England that J. D. Greenwood had left a will, by which he bequeathed to G. O. Greenwood and his brother C. H. F. Greenwood 200*l.* each, and bequeathed to trustees 1500*l.* upon trust to invest it and pay the income of 900*l.*, part thereof, to one of his sisters for her life for her separate use without power of anticipation, with remainder to her children living at her death and the issue of such of her children as should be then dead, and as to the remaining 600*l.* upon similar trusts for another sister and her children and issue. And the testator gave the residue of his property to be equally divided among his brothers and sisters living at his death, and the issue of such of his brothers and sisters as should have died in his lifetime, the issue taking the shares of their deceased parents, and the shares of his sisters being to their separate use. The testator appointed the defendant G. O. Greenwood and several persons resident in New Zealand his executors. G. O. Greenwood proved the will in England.

Difficulties having arisen as to how, in these circumstances, the legacies given by the will were to be provided for, disputes ensued between the parties which ended in a reference to arbitration and an award dated the 1st of September, 1853. This award, and a deed founded thereon, were set aside by the decree in this cause, but as the appeal, so far as related to this part of the decree,

* 32 * was abandoned, it is not necessary to state any further particulars with reference to them.

The bill was filed by the two sisters who were interested in the 1500*l.* and their respective children, and by two of the surviving brothers of J. D. Greenwood, to have the trusts of J. D. Greenwood's will carried into execution under the direction of the Court, and to have the instruments of the 9th and 11th of April, 1851, and the award and deed of 1853, set aside.

The case made by the bill, as to the agreement and deed of April, 1851, was as follows: That in April, 1851, when the news of the death of J. D. Greenwood arrived in England, none of the parties to the agreement other than G. O. Greenwood had any

information as to the testator's property in New Zealand, except that they believed him to have been the owner of a small quantity of land, a cattle station, and some stock. That at a meeting of members of the family on the 9th of April, G. O. Greenwood, who had been in the habit of corresponding with J. D. Greenwood, informed them that he had been a partner of J. H. Greenwood and J. D. Greenwood, and that the estates of both in New Zealand did not amount to 500*l*. That by these representations the brothers and sisters were induced to agree to sell to G. O. Greenwood for 500*l*. their shares in the property of both testators in New Zealand, with the exceptions above mentioned. That the representations made by G. O. Greenwood as to the value of the property in New Zealand were wholly untrue, for that the residuary estate of J. D. Greenwood, after payment of funeral and testamentary expenses, debts, and legacies, was worth several thousands of pounds. That G. O. Greenwood, whether he knew his representations to be untrue or not, ought not to be allowed to retain any benefit derived * from having misled the other brothers * 33 and sisters by them, but that, in fact, he did at the time know the representations to be untrue.

The defendant G. O. Greenwood by his answer stated, that he had, at the time of the agreement, no means of knowing the approximate value of J. D. Greenwood's property in New Zealand, except from the letters received from him, which had latterly been very infrequent. The defendant further stated that the only property of J. D. Greenwood in New Zealand that was of any value was his share in the partnership cattle station, which he managed up to his death. That in 1849 J. D. Greenwood wrote to G. O. Greenwood stating that on his arrival at the cattle station he found it in a very unprosperous condition, and that the property was not estimated at more than 1100*l*. That after this letter J. D. Greenwood never wrote any letter giving any information as to the value of the cattle station, but in his last letter, dated the 2d of November, 1850, stated that the station was going on pretty favourably, considering the bad state in which he found it. The defendant further said in his answer, that at the meeting of the 9th of April he had made statements to the above effect as to the state and value of the station and partnership property, and produced the letters from J. D. Greenwood, and read extracts

therefrom in support of the statements. That the value was discussed by all parties, and that he gave all the information with respect thereto which he had to give, and kept nothing back. He admitted having said, when he offered 500*l.* for the shares of the other brothers and sisters, that he did not believe that it was worth more, but he denied having stated that the residuary estates of J. H. Greenwood and J. D. Greenwood did not amount
* 34 to 500*l.*, and positively * denied all misrepresentation. He offered to provide out of his own funds for all the legacies given by the will.

A mass of evidence, both parol and documentary, was entered into, the documentary evidence chiefly consisting of the correspondence between J. D. Greenwood and the defendant G. O. Greenwood. The evidence did not establish that G. O. Greenwood had made positive misrepresentations. There was, however, nothing to show that the latter part of the correspondence, which showed the improvement in the station, had been either read or referred to at the meeting. The correspondence showed that there were, to the knowledge of the defendant G. O. Greenwood, four hundred acres of land belonging to the partnership, and this fact did not appear to have been communicated. It appeared also that there had been extensive partnership transactions between G. O. Greenwood and J. D. Greenwood, and that there were unsettled accounts in respect of them; but this fact appeared not to have been communicated.

Vice-Chancellor KINDERSLEY set aside all the impeached instruments; proceeding, as to the agreement and deed of April, 1851, on the ground that, owing to the nature of the dispositions of the will, it was impossible to carry them into effect. The defendant G. O. Greenwood appealed.

The Attorney-General (Sir R. PALMER), *Mr. Glasse*, and *Mr. Wickens*, for the appellant. — The Vice-Chancellor was of opinion that the arrangement of 1851 was fair, but held that it could not be carried into effect, on account of the dispositions of the will.

But the mere fact that the will gave legacies does not prevent
* 35 the interests of the parties to the agreement * from being bound. The purchase was purely speculative, and the whole transaction of 1851 forms a family arrangement, which ought not

to be disturbed. *Stapilton* v. *Stapilton*, (*a*) *Guepratte* v. *Young*, (*b*) *Knight* v. *Marjoribanks*. (*c*) The plaintiff has framed his case solely on the ground of misrepresentation, and has proved none; he is, therefore, not entitled to relief, even if he proves suppression. *Wilde* v. *Gibson*, (*d*) *Glascott* v. *Lang*, (*e*) *Cawley* v. *Poole*. (*g*)

Mr. Bailey and *Mr. Fischer*, for the plaintiffs. — The arrangement of 1851 must be treated as having been abandoned by all parties, else why should there have been a reference to arbitration. That arrangement was grounded on mistake, G. O. Greenwood had been a partner, and knowledge of the property must be imputed to him. The just result of the evidence is, that G. O. Greenwood made statements as to the value of the property on which the other parties relied, but if not, it is evident that he, having more information of the circumstances than the other parties, did not make such a full disclosure as to put them on an equal footing with himself. This transaction, therefore, even if looked upon as a family arrangement, cannot stand. *Stockley* v. *Stockley*. (*h*) *Smith* v. *Pincombe*. (*i*) It is, however, not a family arrangement, but a sale. The plaintiffs are not debarred from relief by the form of the pleadings. *Archbold* v. *The Commissioners of Charitable Donations and Bequests*. (*k*) The parties proceeded on the common mistake that James Dent Greenwood would not name any persons as legatees except themselves.

* *Mr. Hardy*, for the representative of a deceased sister. — * 36 The deed of the 11th of April, 1851, has nothing of the nature of a family arrangement. A family arrangement is a compromise between members of a family. Here there was nothing to compromise, all grounds of dispute having been removed by the agreement of the 9th. The transaction of the 11th is a mere transaction of bargain and sale, where the purchaser had superior knowledge and did not communicate it to the other parties with whom he was dealing.

(*a*) 1 Atk. 2; 2 White & Tudor's Leading Cases, 684.
(*b*) 4 De G. & Sm. 217, 222.
(*c*) 2 Mac. & G. 10.
(*d*) 1 H. L. Cas. 605, 622.
(*e*) 2 Phill. 311.
(*g*) 1 Hem. & M. 50.
(*h*) 1 V. & B. 23.
(*i*) 3 Mac. & G. 653.
(*k*) 2 H. L. Cas. 440.

Mr. Glasse, in reply.

Judgment reserved.

December 17.

THE LORD JUSTICE KNIGHT BRUCE. — To this cause, which may be called a family cause, there are numerous parties plaintiffs and defendants. The appeal before us, from a decree pronounced by the Vice-Chancellor KINDERSLEY in May, 1862, is by one of the defendants, namely, Mr. G. O. Greenwood. He is the only appellant. Originally an appeal from part only of the decree, the range of it has been farther reduced by the submission or assent of the appellant's counsel to give up or not to set up two of four instruments set aside by the decree, namely, the two dated in 1853, which, therefore, may be taken as not binding and as abandoned. The stress of the controversy here has been upon two documents dated respectively the 9th and 11th of April, 1851, which are among the four set aside, and by the plaintiffs contended to have been properly set aside, by the decree. The two documents of 1851, however (which are stated with sufficient fulness in the bill, and may, if not forming a single contract, be deemed
* 37 * to be connected together), are still contended by the appellant to have been or to be binding on all the parties to them, except as to the life-interests of the plaintiff Mrs. Kettlewell and the deceased plaintiff Mrs. Sunderland, in a sum of 1500*l.*, to which life-interests those two ladies became entitled respectively for their separate use without power of anticipation.

The suit is for an account, administration, and appropriation for the benefit of the persons alleged by the plaintiffs to be entitled, of the property of Mr. J. D. Greenwood, an Englishman, who farmed and traded in New Zealand, and died in the year 1850, in New South Wales. The defendant Mr. G. O. Greenwood, the appellant, who is his executor, was at his death his partner (for the partnership, though at one time contested, is not so now), and under his will and codicil (both stated in the bill) the plaintiffs and Mr. G. O. Greenwood and others became beneficially entitled to the property of the deceased in various proportions. The decree in the cause would have been and would be substantially (unless possibly as to costs) one in its nature of course, but that the partnership was contested by the plaintiffs, and but for the already

mentioned four litigated instruments dated in the years 1851 and 1853 respectively, disputes which seem to have created all the difficulties before us. The Vice-Chancellor having decided that the partnership existed, and that the two instruments of 1853 cannot stand, and by his determination in those respects the parties having resolved to abide, the controversy before us, unless as to the costs of the suit, is substantially confined for the present to the question whether the two instruments of 1851 have or either of them has been successfully impeached by the plaintiffs or those of them against whom they are set up by the appellant, who insists that they were * fairly entered into, — that * 38 the bill sets up against them a case of fraud only, — and that there having been, as he says, no fraud, each of the two instruments must, in this suit, be treated as valid, subject to the payment of the legacy of 1500*l.*, which, if they shall be treated as otherwise valid, he is willing to make good out of his own funds.

Upon considering, however, the pleadings with attention, I think, having regard especially to the 17th, 18th, 19th, 20th, 21st, 22d, 24th, 26th, 29th, 39th, 40th and 41st paragraphs of the bill, and the 4th and 8th paragraphs of its prayer, that in order to obtain relief against the two instruments of 1851, in order, in fact, to obtain in the suit a decree for setting these aside, it was not nor is necessary to prove fraudulent intention upon the appellant's part, nor do I consider it incumbent on the Court upon the present occasion to declare or state whether, in our judgment, fraudulent intention upon his part has been proved. It is my opinion that, independently of fraudulent intention, and whether there was or was not any such intention, a case within the allegations of the bill has been proved to this effect, namely, that the appellant was the partner and correspondent of the testator down to the time of his death, and had before April, 1851, acquired considerable information and knowledge as to the value of his property and the state of his affairs, which information and knowledge, in order to support the instruments of that month, it was incumbent on the appellant before obtaining either of them to communicate fully to the other parties to them. I am satisfied that the appellant did not do so, that when the arrangement of 1851 was made he knew much more of those matters than any of the other parties to it, and that they and he were not on even terms in the transaction.

There was, I think, substantial inequality, and * whether * 39

without or with wrong intention, he took practically, I conceive, an undue advantage of them. Possibly, however, it may not be wholly immaterial to add the remark, that I consider each of the two sisters was in and throughout the transaction (as well as the other parties to it) unaware that either of the two ladies had any interest for her separate use, or any voice or power in the matter independent of her husband, a remark less important as to the 1500*l.* legacy than as to the real and residuary property of the testator. The suit, it is true, was not instituted before the year 1857, but the circumstances of the case prevent that delay, I conceive, from affecting prejudicially the plaintiff's interests or rights. I consider the decree substantially correct, but if, consistently with that view, any useful alterations or additions can be suggested, I shall be willing, as no doubt will be the Lord Justice, to attend to any such suggestions. I agree in the Vice-Chancellor's suspension of the costs, but as to those of the appeal they must, I think, fall on the appellant.

The Lord Justice TURNER, after stating the facts of the case, proceeded as follows: —

Three points have been relied on upon the part of the plaintiffs. First, that there was misrepresentation and suppression on the part of the defendant G. O. Greenwood, with reference to the agreement and the purchase. Secondly, that what was agreed between the parties could not be carried into effect, in consequence of the dispositions made by the will of J. D. Greenwood, and that the agreement and the purchase therefore fell to the ground; and thirdly, that the defendant G. O. Greenwood, by entering into the reference on which the award and the deed of September, 1853, proceeded, had repudiated the agreement and purchase. The defendant, on the other hand, has insisted that no case is * 40 open on * the pleadings, except that of positive fraudulent misrepresentation, and that, this case not being proved, the bill ought to be dismissed; and, further, that the agreement and the purchase must be taken together, and together constituted a family arrangement, which, according to the principles of the Court applicable to such cases, ought not to be disturbed.

The argument on the part of the plaintiffs, that what had been agreed upon could not be carried into effect, in consequence of the

dispositions made by the will of J. D. Greenwood, was met by an offer on the part of the defendant to invest the 1500*l.* upon the trusts by the will declared of the legacy of that amount, and to pay to the other surviving brothers and sisters the full amount of the sums payable to them under the agreement.

The first question which properly arises upon these arguments is, of course, the question of pleading, and upon this point I think that the objection raised on the part of the defendant cannot be maintained. The bill clearly states an alternative case as to the agreement and purchase being invalid in consequence of the dispositions made by the will of J. D. Greenwood; and although the case of suppression is not perhaps so clearly alleged by the bill as it might have been, I think that that case is no less open upon the pleadings than the case of positive fraudulent misrepresentation, the allegation of the bill in substance being, that the defendant did not truly state the circumstances as they were known to him, which is equivalent to an allegation that he did not state what he knew. If, however, there be any difficulty on this point, the answer seems to me to remove it, as the defendant has expressly alleged that there was no suppression or concealment on his part.

* We come then to the merits of the case, and in dealing * 41 with the case upon the merits I shall assume that the agreement and the purchase are to be taken together, and together constituted a family arrangement, for this is certainly the view of the case most favourable to the defendant G. O. Greenwood, and indeed, having regard to the representations made by him as to the value of the property (representations which, in my opinion, are fully proved by evidence in the cause), I do not see how the agreement and the purchase could be maintained upon any other footing. Assuming then the case to be one of family arrangement, how does it stand? The defendant G. O. Greenwood states in his answer that he had received letters from his brother J. D. Greenwood, giving very unsatisfactory accounts of the station, and of the stock and cattle thereon, but that J. D. Greenwood had in his last letter, dated the 2d of November, 1850, stated that the station was going on pretty favourably, considering the bad state in which he had found it; and he says further by his answer that he produced the letters from his brothers, and read extracts therefrom in confirmation (and these words are remarkable) of the

statements he had made, but the correspondence, as I read it, seems to me to show that the station had been improving from November, 1849, and I do not find in the defendant's answer any statement that this part of the correspondence was either read or referred to by the defendant. Again, the correspondence shows that the defendant knew that there were four hundred acres of land belonging to the partnership, and this fact does not appear to have been communicated. Besides, the correspondence also shows that there had been extensive partnership transactions between the defendant and J. D. Greenwood in the mercantile business carried on by them, and that there was a long unsettled account in respect of these transactions, which the defendant had
* 42 * been repeatedly requested to render and had not rendered.

These facts were all within the knowledge of the defendant. They were not within the knowledge of the other parties. It cannot, I think, be doubted that a full and fair communication of them would, or at least might, have materially influenced the other parties in determining the question whether they would enter into the agreement in question, and sell their interests to the defendant, and those facts were not communicated.

Now I take the rule of this Court to be, that, in order to support a transaction, not otherwise valid, upon the footing of family arrangement, the parties must be upon an equal footing, and there must be a full and fair communication of all the circumstances affecting the question which forms the subject of the arrangement, and I think that in this case the parties were not upon an equal footing, and that, whether purposely or not, there was not in fact a full and fair communication of all the circumstances which were material to be communicated. It may be said perhaps that it was competent to the other parties to have asked for the particulars which were not communicated, and that they did not do so; but certainly I am not disposed to hold that an arrangement not otherwise valid can be supported by this Court as a family arrangement, upon the ground that inquiry might have been made and was not made. This Court does not, according to my view of the law, deal with cases of family arrangement upon any such footing. It expects and requires, as I think, in such cases a full and complete disclosure of all material circumstances within the knowledge of any of the parties, whether inquiry be or be not made as to such circumstances. It expects and requires in such

cases the most perfect *bona fides*, and it is not, in my opinion, consistent with *bona fides* that partial and imperfect statements should be made on * the one side, the party making * 43 them taking the chance whether full and perfect explanation will be required on the other side. Upon this ground alone, therefore, I think that the agreement and purchase in question cannot be maintained, and I prefer deciding the case upon this ground, rather than upon the ground taken by the Vice-Chancellor, — that the agreement could not be carried into effect in consequence of the dispositions of the will; because I think it desirable that there should be no possible doubt as to the principles on which the Court acts in cases of this nature. I desire, however, to be understood as not dissenting from the Vice-Chancellor upon the point on which his decision has proceeded. I say no more upon that point than that I think it unnecessary to give any opinion upon it; nor do I think it necessary to give any opinion upon the question of repudiation insisted upon by the plaintiffs.

I have only to add, that I do not think that the offer made by the defendant George Oates Greenwood, to make good the sum of 1500*l.*, and the sums agreed to be paid to the brothers and sisters, at all alters the case. To hold that it does, would be in effect to alter the agreement between the parties. I have said nothing as to the claim raised on the part of the defendant George Oates Greenwood to the whole of J. D. Greenwood's share of the partnership property, for scarcely any, if any, argument was addressed to us on that point; and I think that the reasons given by the Vice-Chancellor in his judgment are conclusive against the claim. It was asked, on the part of the defendant George Oates Greenwood, that if the decree should be maintained there might be added a direction for sale of the partnership property, but I think it must first be ascertained of what the property consists. For the reasons which I have stated, I am of opinion that this decree must be affirmed, and the appeal dismissed with costs.

* 44 * ADAMS *v.* SWORDER.

1863. November 21, 23. December 22. Before the LORDS JUSTICES.

A purchase was made from the assignees of a bankrupt, in which their solicitor was interested, so as to invalidate the transaction. Afterwards the bankruptcy was by arrangement annulled, without prejudice to any sale or other act done by the assignees, and the bankrupt by deed, to which he and the assignees alone were parties, ratified their acts, relieved them from all claims in respect of them, and agreed to execute all further deeds necessary for confirming them. After this the bankrupt filed a bill against the purchasers to impeach the sale to them. The defendants alleged that the plaintiff had obtained the annulling order by fraudulent suppression.

Held, that by virtue of the annulling order the plaintiff had the right to impeach all sales on any grounds on which they might have been impeached if the bankruptcy had not been annulled, and that the deed executed by him did not affect this right.[1]

Held, also, that the annulling order being in force, this Court must treat it as valid, and could not enter into the question whether it was obtained by fraud.[2]

Held, therefore, that the sale must be set aside, but without prejudice to the question whether the creditors, or the late assignees on their behalf, were not entitled to claim the benefit arising from setting it aside.[3]

Held, also, that the purchaser must account, as a mortgagee in possession, for rents received, or which but for his wilful default he might have received, though no case of wilful default was made by the bill.[4]

THIS was an appeal by the plaintiff from an order of the Vice-Chancellor STUART dismissing his bill.

On the 24th of July, 1856, a petition for adjudication was filed against Samuel Adams, under which he was adjudicated a bankrupt on the following day. The property to which this suit related, being a life-interest of the bankrupt in certain real estates, and a policy of assurance on his life, was put up for sale by auction on

[1] See Kerr F. & M. (1st Am. ed.) 377, 378.

[2] See Bandon *v.* Becher, 3 Cl. & Fin. (Am. ed.) 479, and cases cited in note (2); Kerr F. & M. (1st Am. ed.) 293, 294; Reg. *v.* Saddlers' Co., 10 H. L. Cas. 431.

[3] See Lyddon *v.* Moss, 4 De G. & J. 104, and cases in notes; Kerr F. & M. (1st Am. ed.) 164–166; Holman *v.* Loynes, 4 De G., M. & G. 270, and note (1); Tyrrell *v.* Bank of London, 10 H. L. Cas. 26, 44.

[4] See Kerr F. & M. (1st Am. ed.) 348; Parkinson *v.* Hanbury, L. R. 2 H. L. 1; S. C. *post*, 450, and cases in note (2).

the 21st of October, 1856, and was bought in at 2980*l.* The property was put up again on the 23d of December, 1856, and was bought by the defendant Ree, for 2020*l.* This was under an arrangement by Ree with the defendant Sworder, who was a member of the firm of solicitors who acted for the assignees, that the purchase should be made for the joint benefit of Ree and Sworder. The sale was completed on the 6th of August, 1857. There was evidence to show that Adams knew throughout of Sworder's interest in the transaction.

* The bankrupt passed his last examination; but on the * 45 18th of June, 1858, his certificate was refused without protection, on the ground of his having been guilty of fraudulent concealment of parts of his property.

On the 6th of January, 1860, the bankrupt, who was still uncertificated, made an offer of compromise to his creditors, which, on the 10th of February, was accepted by them under the provisions of the "Bankruptcy Law Consolidation Act, 1849," sect. 230. The substance of the proposal was, that Adams should pay to the credit of the bankruptcy 500*l.*, to be distributed among his creditors in full satisfaction of all their claims, this sum being provided by a friend for that purpose; and that thereupon the adjudication should be annulled and the petition for adjudication dismissed, without prejudice to any thing that had been done under the adjudication, and without prejudice to the right of the creditors to the 500*l.*

The 500*l.* was paid into the bank to the credit of the bankruptcy in the same month of February, 1860.

By indenture dated the 14th of March, 1860, made between the bankrupt of the one part, and the assignees of the other part, reciting the proceedings in bankruptcy and the arrangement for composition; and after further recitals showing that 500*l.*, the amount of the composition, had been paid, and that the assignees since the adjudication had made various sales of the bankrupt's property; and reciting "that it had been agreed between and by the plaintiff and the said assignees, that in order fully and effectually to protect and indemnify the said assignees, their heirs, executors, administrators, estates, and effects, and all persons claiming under them, from and against all loss, liability, and risk of what nature or kind soever, which might at any time thereafter be * sustained or incurred by them or any of them, their or any * 46 of their heirs, executors or administrators, estates or effects,

by reason or on account of any acts or things whatsoever done or authorized to be done by them the said assignees or any of them, in their character as such assignees, and in order to ratify and confirm all such acts and things," the plaintiff should execute the now-stating indenture in manner thereafter mentioned; and reciting that it was intended that, immediately after its execution, application should be made to the commissioner to supersede or dismiss the petition for adjudication: it was witnessed, that in pursuance of the recited agreement, the plaintiff ratified and confirmed all and singular the sales, purchases, &c., made, done, &c., by or with the order of the assignees or any of them, in their character as such assignees, of, in, about, or in relation to the estate and effects of the plaintiff. And the plaintiff declared "that every such sale, purchase, &c., should be thenceforth as binding on him as if the said bankruptcy had not taken place." The indenture then contained a general release by the bankrupt to the assignees of all claims against them in respect of any sale, purchase, contract, or act done, authorized, or sanctioned by the assignees, and a covenant by him to indemnify them against all consequences of their sales, contracts, and acts; and if the bankruptcy should be annulled, to make, execute, and perfect all necessary deeds, acts, and conveyances for confirming the now-stating indenture, and the transactions, matters, and things to which it related.

On the 4th of May, 1860, an order was made in the bankruptcy as follows: —

"Upon application this day made to me by the above-named bankrupt, and upon reading an order of this Court bearing
* 47 date the 25th of July, 1856, whereby the * said bankrupt was adjudged bankrupt; also my certificate bearing date this day, made in pursuance of the general rules and orders of this Court relating to compositions after bankruptcy; also a certificate dated the 23d of February last, of the payment into the Bank of England by the said Samuel Adams of the sum of 500*l.*, in pursuance of his proposal; also an indenture of release and indemnity to the assignees bearing date this day, (*a*) and made between the said bankrupt of the one part, and William Whitmore, John Green Elsey, and Joseph Lawrence, assignees of the estate and effects

(*a*) An erroneous reference to the deed of 14th March.

of the said Samuel Adams, of the other part, and which indenture has been executed by the said bankrupt; and Mr. Lawrance, solicitor to the assignees, appearing and consenting to this order; it is hereby ordered that the said adjudication of bankruptcy be and the same is hereby annulled, and that the petition for adjudication be and the same is hereby dismissed; but this order is expressly without prejudice to any sale made, or any other act, matter, or thing done, by the assignees or otherwise under the said adjudication; and also without prejudice to the right of the creditors to receive the said sum of 500*l*., and any other sum in the hands of the official assignee by way of dividend or composition on their said debts."

In July, 1861, Adams filed his bill against Sworder and Ree to have the purchase of December, 1856, set aside. The Vice-Chancellor dismissed the bill without costs in March, 1863.

After this decision the assignees applied to the Court of Bankruptcy to have the order of the 4th of May, 1860, discharged, on the ground that it appeared from the cross-examination of Adams in this suit that he had * concealed property to a con- * 48 siderable extent, of which they were not aware when they consented to the making of that order, and that their consent had thus been obtained by fraud. The commissioner made an order directing an examination into the circumstances, but the Lord Chancellor on appeal reversed this decision on the ground that the assignees, having been well aware before May, 1860, that the bankrupt had been guilty of fraudulent concealment of property, could not be heard to say that they had consented to the order then made on the faith of his having made a full disclosure of his property.

It having thus been settled that the assignees could not impeach the order annulling the bankruptcy, Adams appealed against the order of the Vice-Chancellor dismissing his bill.

Mr. Malins and *Mr. Herbert Smith*, for the appellant. — The sale in this case is one which cannot stand, being made at an undervalue to an agent of the solicitor of the vendors, the vendors not knowing that the solicitor had any interest in the transaction. According to all the authorities such a transaction cannot be sup-

ported. *Ex parte James*, (*a*) *Ex parte Reynolds*, (*b*) *Ex parte Bage*, (*c*) *Ex parte Bennett*, (*d*) *Ex parte Morgan*, (*e*) *Bailey* v. *Watkins*, (*g*) *Pooley* v. *Quilter*. (*h*) The right to impeach this purchase is now in the plaintiff, for the annulling of the adjudication restores him to all his rights of property subject to any valid sales made by the assignees; leaves him in fact at liberty to
* 49 dispute * them on any ground other than the mere fact of the bankruptcy being annulled. The right to impeach a sale of this nature is not a mere right of action, but an equitable estate which would revest in him. *Gresley* v. *Mousley*, (*i*) *Stump* v. *Gaby*, (*k*) *Wearing* v. *Ellis*, (*l*) *Banks* v. *Scott*. (*m*) The saving in the order cannot have the effect of ratifying any transaction which the assignees could have set aside. The deed of indemnity was intended only for the protection of the assignees, and as regards the purchasers it is *res inter alios acta*, of which the purchasers cannot claim the benefit. *Gardner* v. *Lachlan*. (*n*)

Mr. Bacon and *Mr. Marten*, for defendant Sworder. — The plaintiff procured the order of May, 1860, by fraud; without that order he would not have the shadow of a title to sue; and a title acquired by fraud cannot be enforced in this Court. That order is still liable to be annulled, for the application of the assignees was refused on a ground personal to them, and the order would doubtless be rescinded if creditors were to apply. The annulling of the adjudication was a matter of bargain, and the case does not stand on the same footing as if the bankruptcy had been hostilely annulled on the ground of irregularity in the proceedings, but matters stand as if the assignees had conveyed all their rights to the plaintiff. The right to impeach this sale would not pass by such a deed, it would be a sale of right of suit. 32 Hen. 8, c. 9. *Underwood* v. *Lord Courtown*, (*o*) *Prosser* v. *Edmonds*, (*p*) *Spragg*

(*a*) 8 Ves. 337.
(*b*) 5 Ves. 707.
(*c*) 4 Mad. 459.
(*d*) 10 Ves. 381.
(*e*) 12 Ves. 6.
(*g*) 6 Bligh, N. R. 275, *n.*; S. C. Lord St. Leonard's Law of Real Property, p. 726.
(*h*) 2 De G. & J. 327.
(*i*) 4 De G. & J. 78.
(*k*) 2 De G., M. & G. 623.
(*l*) 6 De G., M. & G. 596.
(*m*) 5 Madd. 493.
(*n*) 8 Sim. 123.
(*o*) 2 Sch. & Lef. 41.
(*p*) 1 Y. & C. Exch. 481.

v. *Binkes.* (*a*) In *Stump* v. *Gaby* and *Gresley* v. *Mousley* the plaintiff was a devisee, * and a right may be devisable * 50 which is not capable of transfer by act *inter vivos*. The deed of March, 1860, confirmed the purchases. It is objected that the purchasers were not parties, but by 8 & 9 Vict. c. 106, § 5, a person may take even an immediate benefit under a deed without being a party to it. The delay of more than a year is fatal, the property being of a precarious description, and the plaintiff having been fully aware of the circumstances all along. Moreover, the plaintiff is suing in respect of a wrong which was no wrong to him, for, if the property had been sold for more, the difference would have been divided at the time among his creditors; they may have a right to complain of the sale as made at an undervalue, but he has none.

Mr. Hobhouse and *Mr. Waller*, for Ree. — We do not contend that this sale could be supported if the bankruptcy were in force, and the assignees were the plaintiffs. There was nothing morally censurable in the transaction, but we admit that the fact of the solicitor being interested in it without the knowledge of the assignees vitiates it. But the plaintiff is in a very different position. Suppose, apart from the case of fraud, that the bankruptcy had been annulled without any condition. Every thing done by the assignees would, in that case, have been avoided. *Ex parte Smith.* (*b*) But it was annulled conditionally. The condition, no doubt, was mainly intended for the benefit of purchasers; the Court would not allow a valid bankruptcy to be superseded by arrangement, so as to affect them; but the effect of the condition does not necessarily stop there, and we submit that the spirit of the arrangement clearly was, that nothing done by the assignees should be disturbed by the bankrupt. But apart from this, how does * the plaintiff make out that the right of the * 51 assignees to impeach the sale has become vested in him? If the assignees had transferred that right to him expressly, assuming it capable of being assigned, which we submit it was not, he would have been barred by his own acquiescence from enforcing it. No such transfer, however, was attempted, but the bankruptcy was annulled. How can that transfer such a right? The plaintiff has

(*a*) 5 Ves. 583. (*b*) Buck, 262, *n.*

nothing to do with the defendants; there is no privity between him and them; they were not his agents, and, therefore, cannot have been guilty of a breach of duty towards him. The only persons who have suffered by a sale at an undervalue, if it was at an undervalue, are the creditors, who are not represented here. The plaintiff, therefore, we submit, has no case, even apart from the fact that he obtained the annulling order by fraud. That circumstance, however, introduces a fresh element. The order to annul is, indeed, unimpeached, but if a party affected by a judgment can show that it has been obtained by fraud, a Court of Equity will not interfere to enforce it against him. *Bandon* v. *Becher*, (*a*) *Price* v. *Dewhurst*. (*b*) The Court will not assist any one who does not come with clean hands. *Pidding* v. *How*, (*c*) *Perry* v. *Truefitt*. (*d*)

Mr. Smith, in reply.—The question, whether the annulling order was obtained by fraud, cannot be entertained. The order is in force, and must have full effect until it is set aside. Then it is said, that the annulling order is tantamount to a reconveyance, and would not pass to us a right to impeach the sale, because a right of suit is not assignable. This is a series of fallacies. *52 There is no analogy * between the annulling order and a reconveyance; by the order the estate is revested in the plaintiff, subject to all acts validly done by the assignees. But this sale in the eye of the Court is no sale, therefore the estate remained in the assignees; what they retained was not a mere right of suit, but an equitable estate. *Wearing* v. *Ellis*, (*e*) *Stump* v. *Gaby*, (*g*) *Gresley* v. *Mousley*. (*h*) The deed of 1860 was intended for the protection of the assignees, and to prevent their being subject to liability for their dealings with the estates; it was not intended to confirm transactions which they were at liberty to set aside. As to the bankrupt's knowledge of the facts at the time, a purchase by a solicitor from a client is not established merely because the client knew that the solicitor was purchasing. *Ex parte Morgan*, (*i*) *Pooley* v. *Quilter*, (*k*) *Ex parte James*. (*l*)

(*a*) 3 Cl. & Fin. 479.
(*b*) 8 Sim. 279.
(*c*) 8 Sim. 477.
(*d*) 6 Beav. 66.
(*e*) 6 De G., M. & G. 596.
(*g*) 2 De G., M. & G. 623.
(*h*) 4 De G. & J. 78.
(*i*) 12 Ves. 6.
(*k*) 2 De G. & J. 327.
(*l*) 8 Ves. 337.

Moreover, as he had no interest at the time, his knowledge is immaterial. There is no evidence that the annulling order was obtained by fraud; it was known that the bankrupt had committed frauds, and the consent to the order cannot have been given on the faith of the true state of things being known at the time.

Judgment reserved.

December 22.

THE LORD JUSTICE KNIGHT BRUCE.—Samuel Adams was in July, 1856, adjudicated a bankrupt. His affairs seem not to have been within a very narrow or limited compass. His property, among other particulars, comprised a life-interest in a real estate * in Hertfordshire, worth several hundred pounds per annum, * 53 and comprised also a policy of insurance on his life. This life-interest and this policy were, in December, 1856, contracted by the assignees under the bankruptcy to be sold, that is to say, were then sold by them by public auction, to Mr. Ree, one of the defendants in this cause, an auctioneer who had in some way been employed by the assignees, an employment, whatever it was, which the other facts of the case render, I think, immaterial. The sale was completed in the year 1857. Mr. Ree, though nominally and apparently the sole bidder, sole contractor and sole purchaser, did in fact bid and contract for the life-interest and the policy, and bought them, on the account of himself and the other defendant Mr. Sworder. They were together interested in the transaction, and from the beginning and throughout were (to borrow an expression used by Mr. Sworder on the subject) partners in the matter, and they seem to have so continued. But Mr. Sworder before and at the time of the auction, and thenceforth to and at the time of the completion of the sale and afterwards, was one of the solicitors under the bankruptcy to the assignees. At the foot of the first page of the particulars and conditions of sale, printed and used for the purpose of the auction of December, 1856, is this statement: "May be viewed by permission of the tenants, and printed particulars had at the place of sale, of Messrs. Longmore, Sworder, & Longmore, solicitors; Mr. Jackson, Mr. Medcalf, Hertford; of Messrs. Ree & Sons, Ware; and in London of Messrs. Lawrance, Plews, & Boyer, solicitors, and Plews & Wall," who were auctioneers. Messrs. Ree & Sons and Messrs. Longmore,

Sworder, & Longmore there mentioned include the defendants. The third and fifth conditions of sale are thus: "3. Each person shall pay to the auctioneer immediately after the sale a deposit of twenty per cent in part of the purchase-money, and sign
* 54 * an agreement for payment of the remainder on the 26th of December next, at the office of Messrs. Longmore, Sworder, & Longmore, Hertford." "5. All objections and requisitions which any purchaser has to make shall be delivered in writing to the vendors' solicitors within twenty-one days from the receipt of the abstract, and none afterwards delivered shall be of any avail; and if any objection or requisition shall be so delivered, which the vendors shall be unable or unwilling to remove or comply with, they shall be at liberty (notwithstanding any attempt to remove or comply with the same) to rescind the contract, on returning the deposit, without interest or costs."

Of course if the assignees had, while assignees under the bankruptcy, contested the sale and sought to set it aside before or after its completion, whether the price was high or low, or neither (though I may observe in passing that it seems to have been in fact not a high price), they would plainly have been entitled to succeed in that contention. They did not make the attempt. But these things happened. Fraudulent conduct on the part of the bankrupt towards the body of his creditors or some of them was proved, and his certificate consequently was, in the month of June in the year 1858, though he had passed his last examination, refused. Mr. Adams, however, desiring neither to pay his creditors in full nor to remain an uncertificated bankrupt, procured one of his friends or acquaintances to offer a sum of 500*l.* to the creditors under the bankruptcy as a consideration for allowing the bankruptcy to be superseded and annulled under (I think) the 230th section of the Statute 12 & 13 Vict. c. 106. The offer was accepted, and accordingly, in May, 1860, an order in the bankruptcy was made to this effect: [His Lordship here read the order of the 4th of May, 1860.]

* 55 * But the order had been preceded by a deed connected with the offer and the intention to procure the bankruptcy to be annulled, which deed, dated 14th March, 1860, and executed by Samuel Adams, was, so far as is material to be stated, to this effect: [His Lordship read the material parts of the deed.] This deed is mentioned in the order of May, 1860, though by a wrong

date. The order of May, 1860, has not been discharged or varied, but remains in force, and the bankruptcy has ever since that order been and now remains superseded and annulled, and the probability or improbability that the order of May, 1860, will be discharged or varied, that the bankruptcy will be set up again or restored, is, I think, for every present purpose, immaterial.

After the order of May, 1860, namely, in July, 1861, the bill in this suit was filed by Samuel Adams, the late bankrupt, the sole plaintiff, its object being to set aside the sale; and the main question before us really is, not as to the merits of the purchase, which are none, but whether the plaintiff is a person capable of suing; not whether the sale can, if properly questioned, stand, but whether Samuel Adams can properly question it. The defendants contend that, independently of the confirmations contained in the deed and order of 1860, the suit is not competent to the present plaintiff, but that if it were so, the order and deed of 1860 are fatal to it. I apprehend, however, that plainly, if the bankruptcy had not been superseded or annulled, but had remained now in force, the assignees would have been before and in 1861, and would be now, entitled to sue the two defendants successfully for the purpose of setting aside the contract and sale of 1856 and 1857, and regaining for the bankrupt's estate the life-interest and policy sold, regaining them (that is of course) on the usual terms of account and so forth. And I am of opinion that in the * actual circumstances a good title to do so was at the time * 56 of filing the present bill, and is, vested in the plaintiff, whatever and however censurable his conduct may have been towards his creditors; though whether the plaintiff will be able to retain, against the creditors under the bankruptcy, what he shall recover in this suit, may be questionable. That is a point as to which I do not pronounce or intimate any opinion favourable or unfavourable to the plaintiff, but with which the defendants seem to me to have, for any purpose of the present litigation, nothing to do. The confirmations of the assignee's sales and transactions which took place in March and May, 1860, may have been and may be material as between Mr. Adams on one hand and the assignees and creditors under the bankruptcy in those characters on the other, but were, as to the defendants, matters *inter alios*, and were not, as I conceive, intended to prevent, defeat, or prejudice, nor had, in my opinion, the effect of preventing, defeating,

or prejudicing, the claim made by Mr. Adams in this suit, which may possibly be, though I do not say that it will be, less for his benefit than for that of the creditors under his bankruptcy in that character.

It has been argued that the order of May, 1860, annulling the bankruptcy, was obtained by fraud. That, I apprehend, is not in any sense material at present. It may be that the order was an erroneous decision (though I do not say so). It may be that the bankrupt, at the time of obtaining the order, was aware of facts not disclosed to the learned commissioner who made the order, which, if they had been disclosed to him, would have induced him to decline making any such order (though I do not assert that the bankrupt was so); but in my judgment the order is not by such means made void, though it may be liable to
* 57 be attacked successfully. As * I have said it has not been successfully attacked, and it is, as I conceive, in full force. Assuming that the bankrupt, by omitting before obtaining the order to state to the assignees and to the commissioner these undisclosed facts, acted improperly, assuming there to have been suppression and falsehood on the bankrupt's part upon the occasion of obtaining the order, I still think, that for any present purpose (independently of any difficulty in the defendant's way from the state of the pleadings) we are bound to regard the order as valid. It has been said also that the plaintiff knew of Mr. Sworder's interest in the purchase from a time preceding its completion. That also I apprehend to be purely immaterial, the bankruptcy not having been annulled before 1860.

I consider that we ought now to set aside, with the usual directions, the plainly improper and censurable purchase which the suit impeaches; and whatever may have been the demerits of the late bankrupt towards the body of his creditors under the bankruptcy or any of them, however untrusty he may be as a witness, I conceive that public policy and private justice require that at least a portion of his costs of the litigation should fall on the defendants, who should, in my opinion (unless preferring a taxation), pay the plaintiff 100*l.* for his costs of the suit to the present time.

The form of our decree will require attention. It should, I think, declare that the sale in question cannot stand; and accounts and inquiries must, I conceive, be directed for the purpose of

ascertaining the amount to be on that footing paid by the plaintiff to the defendants, or by the defendants to the plaintiff, who should be credited, I think, with the 100*l.* (unless the defendants shall prefer a taxation) for his costs of the * suit to * 58 this time. In other respects the cause should, I suppose, stand for further consideration; but in my opinion the decree ought to be declared to be without prejudice to the question, whether the creditors under the late bankruptcy, or the late assignees on their behalf, are or will be, as between themselves and the plaintiff, entitled to claim the benefit, if any, to arise from setting aside the sale.

THE LORD JUSTICE TURNER. — My learned brother has entered so much at large into this case, and I so fully agree in what has been said by him, that I have very little to add. That the purchases in question in this suit could not have been upheld against the assignees admits, I think, of no doubt whatever. The real question, therefore, which we have to consider seems to me to be whether they can be upheld against the plaintiff, the late bankrupt, when the title of the assignees to impeach them has been removed by the bankruptcy having been annulled.

It was said in the first place, on the part of the defendants, that the plaintiff, the late bankrupt, procured his bankruptcy to be annulled by fraud and misrepresentation; but this point does not appear to me to be open upon the pleadings, and even if it was, I do not think we could act upon it. The order annulling the bankruptcy is in force, and so long as it remains in force we are bound, I think, in this jurisdiction to treat it as valid. That this order was made and the bankruptcy annulled, without prejudice to the sales made and the acts done by the assignees under the *fiat*, does not, I think, alter the case. This provision would of course prevent the titles of purchasers from being impeached on the ground of bankruptcy having been annulled; * but it could * 59 not, as I apprehend, protect them from impeachment on other grounds. Then it was said that the plaintiff was not entitled to impeach these purchases by reason of the provisions contained in the deed of the 14th of March, 1860, entered into by him with the assignees; but this deed does not seem to me to furnish the defendants with any valid ground of objection to this suit, for the defendants are no parties to the deed, and it was quite

competent to the assignees to waive the provisions of it as between them and the plaintiff; nor indeed am I prepared to say, that if the circumstances had been such as to render it necessary for the plaintiff to use the names of the assignees in this suit, he would not have been well entitled to do so, indemnifying them.

Again, it was said for the defendants, that the plaintiff was no more than a purchaser from the assignees of the right which they had to set aside these purchases, and it was insisted that there could be no valid transfer of a right of this nature; but even assuming that there could be no valid transfer by the assignees of their right to impeach these purchases, which, under the circumstances of this case, I am by no means prepared to admit, I think that, by virtue of the order annulling the bankruptcy, the plaintiff became entitled to recover back his property upon any other sufficient ground than that of the bankruptcy being annulled, and that he is, therefore, well entitled to recover in this suit, the purchase from the assignees having been fraudulent and void. Some argument was also attempted to be raised, on the part of the defendants, upon the ground of the plaintiff having at the time when the purchases were made, or very soon afterwards, been aware that the defendants had become the purchasers, and not having sooner instituted this suit, but I think it is a sufficient answer to
* 60 this argument * that the plaintiff could not sue until the bankruptcy was annulled. For these reasons, in addition to those assigned by my learned brother, my opinion is, that this decree cannot be maintained, and that there must be a decree for setting aside these purchases upon the usual terms, and I agree with what the Lord Justice has proposed as to the costs, and as to the decree being without prejudice.

1864. February 25.

The case was this day spoken to on the minutes, a question having been raised, whether the account of rents ought, as of course, to be on the footing of wilful neglect and default, as in the case of a mortgagee in possession, or whether, as no special case of wilful neglect or default had been made in the bill, the account ought to be simply of rents and profits come to the hands of the defendant.

Mr. Herbert Smith, for the plaintiff, contended that, on the bal-

ance of authority, the account was, as of course, on the footing of wilful neglect and default, the defendant being, in fact, a mortgagee in possession. *White* v. *Lightbourne*, (*a*) *Gould* v. *Okeden*, (*b*) *Murray* v. *Palmer*, (*c*) *Watt* v. *Grove*, (*d*) *Gibson* v. *D'Este*, (*e*) *Neeson* v. *Clarkson*, (*g*) *Douglas* v. *Culverwell*, (*h*) *Pearson* v. *Beavan*. (*i*)

Mr. Marten, for Sworder. — The account is directed on the footing of wilful * neglect and default against a mortgagee in * 61 possession, in order to spur him on to make the most of the rents, that the debt may be reduced as quickly as possible. *Lord Kensington* v. *Bouverie*. (*k*) This reasoning does not apply, nor can the rule, as I submit, be fairly applied to the case of a person who receives the rents, believing himself to be the beneficial owner. It has not been the practice to direct an account, on the footing of wilful neglect and default, in cases where the possession is not primarily referable to the character of mortgagee, the party becoming a mortgagee only by virtue of the decree. Sugden's Vend. & Purch., (*l*) *Trevelyan* v. *Charter*, (*m*) *York Buildings Company* v. *Mackenzie*, (*n*) *Murphy* v. *O'Shea*, (*o*) *Ex parte James*, (*p*) *Gresley* v. *Mousley*. (*q*)

Their Lordships held that the account ought to be taken on the footing of wilful neglect and default.

(*a*) 4 Bro. P. C. 181.
(*b*) 4 Bro. P. C. 192.
(*c*) 2 Sch. & Lef. 474–490.
(*d*) 2 Sch. & Lef. 492.
(*e*) 3 Y. & C. C. C. 542, 581.
(*g*) 2 Hare, 163, 176.
(*h*) 3 Giff. 251; affirmed, 10 Weekly Rep. 327.
(*i*) 28 Beav. 598.
(*k*) 7 De G., M. & G. 134, 156, 157.
(*l*) Page 897 (11th edit.).
(*m*) Seton Decrees, p. 303 (2d edit.); p. 646 (3d edit.).
(*n*) 8 Bro. P. C. 42–70.
(*o*) 2 Jo. & Lat. 422–430.
(*p*) 8 Ves. 337, 351.
(*q*) 4 De G. & J. 78, 101.

* 62 * WILKINSON *v.* ROGERS.

1864. January 11. Before the LORDS JUSTICES.

A lease of a house contained a covenant by the lessee to use the house as a private dwelling-house only, provided that if any of the adjoining houses of the lessor should be "converted into a shop," the lessee might "convert the demised premises to a similar use." One of the adjoining houses of the lessor was afterwards let to a photographer, who exhibited photographs outside, and used the ground-floor room for the exhibition of photographs and the sale of albums, cases, and frames, the door being kept open by day, but no alteration was made in the building. *Semble*, that "conversion into a shop" might be effected by user, without any structural alterations of the house, and that there had been such a user of the house for the sale of goods as to be a conversion into a shop within the meaning of the proviso.[1]

THIS was a motion by way of appeal from an order of the Master of the Rolls granting an injunction at the suit of a landlord to restrain the carrying on of the business of a coal-merchant at a house in Westbourne Grove, Paddington, in breach of the stipulations of the lease under which the premises were held.

By indenture dated the 25th of January, 1859, Mr. Sperling, under whom the plaintiff derived title, and who was entitled for a term of years at a ground-rent, demised the house in question, No. 39, Westbourne Grove, to the Rev. W. G. Lewis for twenty-one years. The lease contained among others the following covenant:—

"And further, that he the said W. G. Lewis shall and will keep and use the said messuage as and for a private dwelling-house only, and shall not do or suffer to be done upon the said premises or any part thereof any act or thing which may be or grow to be annoyance, damage, or disturbance to the said J. Sperling, or the landlord or landlords for the time being of the said premises, or the tenants for the time being of the said J. Sperling, or the superior landlord or landlords of adjoining or adjacent premises; but if any or either of the adjoining or adjacent premises now belonging to the said J. Sperling shall be converted into a
*63 shop, he the * said W. G. Lewis shall be at liberty to convert the premises hereby demised to a similar use."

[1] See 2 Dart V. & P. (4th Eng. ed.) 701, note (*i*), 706, 707.

At the time when this lease was granted, Mr. Sperling was also entitled to the houses numbered 37, 38, and 40. In December, 1860, he assigned his interest in all four houses to the plaintiff.

In June, 1861, the plaintiff let No. 40, which adjoined No. 39, to Mr. Fisher by a written agreement, which contained a stipulation, "that he the said Richard Fisher shall not, during his tenancy under this agreement, make a shop of the said premises, or carry on or permit to be caried on on the said premises any offensive trade or business, or in any way alter the architectural appearance of the said premises, or do or permit to be done any act or thing whereby the lease under which the said P. Wilkinson holds the said premises may be forfeited or invalidated in any manner whatsoever."

In July, 1862, Mr. Lewis assigned his lease of No. 39 to the defendant Rogers, and Rogers in June, 1863, sub-let to the defendant Andrews, both of them having notice of the covenant set out above. The defendant Andrews put up in the window a notice in these words: "Alpheus Andrews, coal office, and at the Coal Exchange." No alteration was made in the house, nor did the defendant Andrews keep any stock of coals about or near it, but only received there orders for coal, which he supplied from his other address. At this time No. 37 was occupied by a surgeon, No. 38 by a dentist, both of whom had on their doors brass plates, with their names and professions. The bill was filed to restrain the defendants from carrying on or allowing to be carried on the business of a coal-merchant at the house, and from exhibiting the above notice in the window, and from * using the * 64 house or allowing it to be used otherwise than as a private dwelling-house.

The defendants in opposition to the motion for the injunction adduced evidence, among other things, to show that the house occupied by Mr. Fisher had been "converted into a shop," so as to bring the proviso into operation. Mr. Fisher, who was a photographer, gave evidence on the motion, and was orally cross-examined before the Lords Justices on the appeal motion. The result of the evidence was, that when he took the premises, he told the plaintiff that he wanted them for his business as a photographer and artist. Upon taking them, he built a photographic studio at the rear. The words "Fisher, Photographer," were painted up outside. Photographs in a large frame were exhibited outside, but only as specimens of the artist's skill, and not for sale. The door

on the ground-floor was kept open; and in the ground-floor room was a table on which were exhibited albums, frames, cases, and photographs. The table was a movable table, without a cash drawer. The photographs were taken by himself, and were exhibited as specimens of the artist's skill, and not for the purpose of sale; but he said he should have sold them, if any one had wished to buy them. He sold many cases, and a good number of frames, but generally to those persons only who had their portraits taken by him; he also sold albums. The shutters on the ground-floor were generally closed on Sundays.

About June, 1863, after Mr. Fisher had continued his business for about two years, the plaintiff gave him notice to discontinue all show of business about the premises. Fisher thereupon asked the plaintiff to take the house off his hands, and ultimately, about the end of August, possession of it was given up to the plaintiff.

* 65 * This was before the bill was filed. The street consisted almost entirely of shops.

The Master of the Rolls was of opinion, that the proceedings of the defendants were a breach of the covenant, and that, assuming Fisher's business to have been carried on without any objection on the part of the plaintiff, the stopping that business before the bill was filed precluded the defendants from taking any advantage of his having formerly carried it on. His Honor accordingly granted an injunction as prayed, which the defendant Rogers now moved to discharge.

Mr. J. H. Palmer and *Mr. Boyle*, for the appeal motion. — The landlord cannot maintain this bill after allowing the surrounding property to be used as it has been. *Duke of Bedford* v. *Trustees of the British Museum*, (*a*) *Roper* v. *Williams*. (*b*) Moreover, Fisher's premises were converted into a shop within the meaning of the proviso in our lease. The Master of the Rolls so far agreed with us on these points, that he evidently would not have granted the injunction, but for the fact of Fisher's business having been discontinued before the bill was filed. That, we submit, makes no difference, as his business was being carried on when we took possession and commenced the course of proceeding now complained of. We say, moreover, that we have not broken the covenant; it was

(*a*) 2 M. & K. 552. (*b*) T. & R. 18.

intended to guard against converting the premises into a shop, and we have done nothing which can be so described. Suppose a solicitor were to put upon his door a brass plate, with his name and profession inscribed, surely that would not be *turning the *66 house into a shop? — and what we have done amounts to no more. At all events, we submit that the plaintiff ought to be left to his remedy at law, by ejectment. The foundation of the remedy by interlocutory injunction is irreparable damage; here there is none, nor any thing amounting to nuisance; mere depreciation in the value of property is not enough. *Attorney-General* v. *Nicholl.* (*a*) Now that the Court can assess damages, the quantum of injury is a material element in these cases; and here the injury is infinitesimal, and the remedy at law quite sufficient. The present case is governed by *Child* v. *Douglas.* (*b*)

Mr. Locock Webb, for Andrews.

Mr. Selwyn and *Mr. Swanston*, for the plaintiff. — The breach of covenant is manifest. A person who sets up a placard on his house bearing the words "coal office" is not using it "as a private dwelling-house only." Now as to our allowing trades to be carried on in adjoining houses, we say that *Duke of Bedford* v. *Trustees of the British Museum*, (*c*) and *Roper* v. *Williams* (*d*) do not apply. In those cases permanent buildings had been erected, here no structural alteration was made in the plaintiff's adjoining houses. *Kemp* v. *Sober* (*e*) shows the difference between assenting to temporary and to incurable breaches of covenant. Then as to the proviso, we say, that as no structural alteration was made in Fisher's house, it cannot be said to have been "converted into a shop." The proviso does not extend to its being "used as a shop." We submit, however, that it was not even used as a shop; it was a photographic *studio, and selling formed only a trifling *67 part of his business. Even that was discontinued, and thereupon the house reverted to its original character of a private house. Quantum of damage is immaterial where the right of the plaintiff is founded on contract.

(*a*) 16 Ves. 338.
(*b*) 5 De G., M. & G. 739.
(*c*) 2 M. & K. 552.
(*d*) T. & R. 18.
(*e*) 1 Sim. (N. S.) 517.

Mr. Palmer, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — On the present occasion, I think it proper to give an opinion solely on one of the points raised in argument; namely, on the question as to the meaning and effect of the words contained in the lease of the 25th of January, 1859, "but if any or either of the adjoining or adjacent premises now belonging to the said J. Sperling shall be converted into a shop, he the said W. G. Lewis shall be at liberty to convert the premises hereby demised to a similar use." The first question to which I mean to address myself is, whether any or either of the "adjoining or adjacent premises" have or has been converted into a shop. The house occupied by Mr. Fisher is part of the property described in the lease as "adjoining or adjacent premises;" of that there can be no doubt. Has it then since the granting of the lease been "converted into a shop" within the meaning of those words as used in that instrument? I am of opinion that there is, to say the least, ground for great and serious doubt, whether it has not been so converted. It is true, that there has not been any architectural or structural alteration in the house (to borrow the phrases used during the argument), but there has been a use of it for the sale of goods. That there has been no "architectural or structural" change makes, in my opinion, no difference; the question, in my judgment, being, has it been converted into a place for the *68 sale of goods? As at present *advised, I am of opinion that it has. What, then, is the consequence of its being converted into or (which, as I think, means the same thing) being used as a shop? The lease provides "that if any or either of the adjacent premises now belonging to the said J. Sperling shall be converted into a shop, the said W. G. Lewis shall be at liberty to convert the premises hereby demised to a similar use." The omission of words of limitation after the name of Mr. Lewis is, in my judgment, immaterial. The word "convert" must be considered as used in the same sense in both parts of this clause. Has, then, the lessee been placed at liberty to use the property comprised in his lease for a similar purpose? I think that he has. Is the use to which he has lately put the property a "similar use?" He has used it as a place of business, not for selling goods over the counter, which probably would be difficult in the case of coals, but for selling goods to be supplied from another place. It seems to

me that this is a similar use within the meaning of that expression as used in this instrument. If obliged to decide the case now, I should so decide it; but it is not necessary to decide it. It is enough, on the present occasion, to say that, on the materials before us, the case of the plaintiff cannot be presented more favourably than as a case open to great and serious doubt, and, irreparable damage to the plaintiff being out of the question, I think that the case for an interlocutory injunction fails. The injunction will be discharged without prejudice to any question, and the costs, both here and at the Rolls, made costs in the cause.

THE LORD JUSTICE TURNER.—I agree that the case for an injunction fails, and I also think that the costs ought to be costs in the cause. I assume for the present purpose that there has been a *breach by the defendant of the covenant contained in the *69 lease to Lewis, though I give no concluded opinion upon that point. I think that it is sufficient for the present purpose to deal with the case on the proviso contained in the covenant. It has been argued for the plaintiff that there could be no conversion into a shop of the premises demised to Fisher, unless there was a structural or architectural alteration in those premises, but I am not prepared to go that length. I am disposed to think that a building may be converted into a shop either by structural or architectural alteration or by user, but in my opinion the questions whether there could or could not be such a conversion within the meaning of the proviso by user only, and whether there has or has not been in the present case such a user as to amount to such a conversion, are questions to be decided at the hearing of the cause. It was pressed in argument for the plaintiff, that there is here a direct covenant on the part of Lewis by which the defendant is bound to use the premises demised to him as a private dwelling-house only; and that where a person has entered into a direct covenant the Court will, in all cases, interfere at once to restrain him from committing a breach of it; but I am mistaken in my view of the law if this be the rule of the Court. No doubt, if the covenant is clear and the breach of it is clear, and serious injury is likely to arise from the breach, it is the duty of the Court to interfere before the hearing to restrain the breach. But if the covenant is obscure or the breach doubtful, and no irreparable damage can arise to the plaintiff, then, according to the course of the Court as I under-

stand it, the case resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted or the plaintiff by its being withheld.[1]

Here it is plain that great damage would be done to the de-
* 70 fendant by granting the injunction, and it does not * appear by the evidence that any substantial damage can arise to the plaintiff from our withholding it. I am of opinion, therefore, that the injunction ought to be dissolved.

THE LORD JUSTICE KNIGHT BRUCE.—I believe I omitted to observe on the point made on behalf of the plaintiff, that the use by Mr. Fisher of his house for photographic purposes had ceased before the bill was filed. My opinion is, that this makes no difference as to the course the Court ought to take.

FROST *v.* WARD.

1864. January 13. Before the LORDS JUSTICES.

A suit was instituted on the 16th of October on behalf of infants by their great-uncle, as their next friend, for the administration of the estates of their father and mother. On the 18th of November a second suit was instituted on behalf of the same infants by a stranger as their next friend, and a decree was obtained on the 21st, the solicitors for the plaintiffs in the second suit being the London agents of the solicitors of the defendant: *Held*, that in these circumstances the institution of the second suit was improper, and that the conduct of it ought to be given to the next friend in the first suit.[2]

THIS was a motion by way of appeal from an order of Vice-Chancellor STUART refusing to give the conduct of proceedings under the decree in the second above-mentioned cause to the plaintiffs in the first cause.

The two suits were for the administration of the estates of Thomas Frost, who died in 1861, and of his widow, Mary Frost, his trustee and executrix, who died on the 5th of September, 1863.

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1640, and cases in notes (2) and (3); Hodgson *v.* Earl of Powis, 1 De G., M. & G. 6, and note (2).

[2] See 1 Dan. Ch. Pr. (4th Am. ed.) 69, 70; Rhodes *v.* Barret, L. R. 12 Eq. 479.

The bill in the first cause was marked for the Master of the Rolls, and was filed on the 16th of October, 1863, by the infant children of Thomas and Mary Frost, *against the trustee and executrix of Mary Frost. The next friend of the infants was Samuel Frost, their great-uncle. *71

The bill in the second cause was marked for the Court of Vice-Chancellor STUART, and was filed on the 18th of November, 1863, in the name of the same plaintiffs, by G. W. Gunnell as their next friend. The solicitors of the plaintiffs in the second cause were the London agents of the country solicitors who acted for the defendant in both causes. Mr. Gunnell was a stranger to the family, and no explanation was given as to the motives which induced him to act as next friend.

The second cause was heard as a short cause and a decree made therein on the 21st of November, 1863, while the first suit was not yet ready for hearing.

On the 25th of November the Master of the Rolls, on the application of the defendant, made an order staying all proceedings in the first suit, with liberty to the plaintiffs in that suit to apply to Vice-Chancellor STUART as they might be advised with respect to the second suit. On the same day an order was made for transferring the first suit to the Court of Vice-Chancellor STUART.

On the 22d of December the plaintiffs in the first suit moved before Vice-Chancellor STUART, in both suits, that they, by Samuel Frost their next friend, might have the conduct of the proceedings in the second suit. The Vice-Chancellor refused the motion.

It was in evidence that Mr. Samuel Frost, the next friend in the first suit, was a person of substance and of business habits, and there was no imputation upon him, nor was his suit alleged to be in any way an improper *one. It was objected, however, that his solicitor had been the solicitor of Mary Frost, and that she had committed breaches of trust as to her husband's estate, which were not so likely to be properly investigated, if the proceedings were in his hands, as if they were in those of another solicitor. *72

Mr. Osborne and *Mr. Waller*, for the appellants. — There is no imputation on the next friend in the first suit; nor is there any allegation that the institution of that suit was improper. The next friend in that suit is a natural protector of these infants; whereas

there cannot be any doubt, that the next friend in the second suit, the reason for whose acting is not given, is a nominee of the defendant, the solicitors in that suit being virtually the same on both sides. If the order of the Vice-Chancellor is to stand, no suit on behalf of infants can ever be effectually prosecuted, as the defendant may defeat it by procuring the institution of another suit by a nominee of his own as next friend, and allowing a decree in it to be taken at once.

Mr. Malins and *Mr. Woodhouse*, for Gunnell. — There is nothing against Mr. Gunnell, nor any reason why he should be deprived of the conduct of his own suit. The obtaining a decree in this summary way is a benefit to everybody, where there is no occasion for hostile proceedings; and it is often found best that a stranger should be the next friend.

Mr. Greene and *Mr. Danvey*, for the defendant. — Our client has received no assets, and has therefore no personal interest in the matter; all she wishes is the benefit of the infants. The breaches of trust which Mrs. Frost committed are not likely
*73 to be properly *investigated by the persons who were her own legal advisers.

Mr. Osborne, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The earlier of these suits, that before the Master of the Rolls, was instituted on the 16th of October last; the later suit, that before Vice-Chancellor STUART, was instituted on the 18th of November last, and a decree in it was obtained three days afterwards, namely, on the 21st of November; the solicitors being in effect but one, acting on both sides in the suit in which the decree was obtained. The obtaining a decree thus early, the obtaining a decree while one has not been obtained in an earlier suit instituted for the same purpose, and the identity of the solicitors for the plaintiffs and the defendant in the suit in which the decree is obtained, may in some cases be not material, but in my view every one of those circumstances in this case is material, and I think that the second suit ought not to have been instituted. I think, that, as between Mr. Frost, a relative of the infant plaintiffs, and Mr. Gunnell, of whom we

know nothing, and whose intervention in the proceedings is not explained, Mr. Frost is the proper person to have the conduct of the cause in which a decree has been made. We do not intend to prejudice any application which may hereafter be made to remove Mr. Frost from having the conduct of the cause on the ground of negligence, or any other sufficient reason; but, as matters now stand, we think that the conduct of the cause ought to be given to him. Such affidavits have, however, been filed, and such a course taken on both sides, that our order ought, I think, to be silent as to costs.

THE LORD JUSTICE TURNER. — I am of the same opinion, and have nothing to add.

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*RACKHAM *v.* DE LA MARE. *74

1864. January 23, 25. Before the LORDS JUSTICES.

A testator gave his residuary estate in trust for his wife for life, and after her death he directed that one-sixth of the fund should be held in trust to pay the income to his daughter H. R. for life, and after her death for her children, who being a son or sons should attain twenty-one, or being a daughter or daughters attain that age or marry. He gave other shares upon similar trusts for others of his children by name and their children respectively. The will contained a proviso that if any of his said children should die without having any child who under the above trust should become absolutely entitled to a share of the trust fund, then as well the original share thereby given as also the share accruing under the proviso to each child whose issue should so fail and his or her children or child, should go to the survivors or survivor of the testator's said children, and if more than one in equal shares during their respective lives, and after their respective deaths the said shares to be respectively transmitted to such their respective children or child as therein-before expressed with respect to their original shares.

H. R. was living at the date of the will, but died childless in the testator's life-time: *Held*, that her share was not undisposed of, but that the gift over in the proviso took effect.

THIS was an appeal from a decision of Vice-Chancellor STUART on the construction of the will of Mr. Francis Rackham.

The testator by will dated the 14th of December, 1836, bequeathed his personal estate to trustees upon trust to convert and invest it. He devised his real estate to the same trustees, and

directed them to pay the income of the real and residuary personal estate to his wife, and after her death to sell his real estate, and he disposed of the proceeds and of his residuary personal estate as follows, namely, as to one-sixth thereof he directed that his trustees or trustee should, during the life of his daughter Charlotte De la Mare, pay the income to her for her separate use, with a restraint on anticipation, and after the decease of his daughter Charlotte De la Mare, as to the said share of the said trust-moneys, stocks, funds, and securities, in trust for all and every her children or child, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters
*75 should attain that age or marry * under it, to be awarded between and amongst such children, if more than one, in equal shares, and if there should be but one such child, the whole of the said shares of the said trust moneys, stocks, funds, and securities to be in trust for such one child. As to another sixth the testator declared that the same and the income thereof should be held upon trusts for the benefit of his daughter Harriet Rackham during her life, and her children or child after her decease, similar to the trusts thereinbefore declared concerning the first-mentioned sixth part or share for the benefit of his daughter Charlotte De la Mare and her children or child. The testator made dispositions similar in character of three of the other sixths, each for the benefit of a child of the testator by name and the children of such child, but the remaining sixth he gave to a daughter for life, without making any further dispositions of it: provided always, that if any one or more of the said sons and daughters should die without having any child who under the trusts aforesaid should become absolutely entitled to a share of the said trust moneys, stocks, funds, and securities, then and in every such case, as well the original share thereinbefore given as also the share or shares by virtue of that clause surviving and accruing to each and every of his said sons and daughters whose issue should so fail, and his or her children or child, should vest in, accrue, and belong to the survivors or survivor or others or other of his said sons and daughters in equal shares, if more than one, during their respective lives, and after their respective deaths the said shares to be respectively transmitted to such their respective children or child as thereinbefore expressed with respect to their original shares.

The testator died on the 22d of July, 1842. His *daughter *76 Harriet died unmarried in 1841, in his lifetime. His other five children named in his will survived him.

The testator's widow died in 1861. The acting trustees having sold the real estate paid one-fifth of the whole trust fund to the children of the testator's daughter Charlotte De la Mare, treating the share of Harriet Rackham as having gone over under the proviso.

The plaintiff was the eldest son and heir-at-law of the testator, and he filed his bill for carrying into effect the trusts of the will, insisting that the sixth share given to Harriet Rackham had lapsed, and Vice-Chancellor STUART decided this point in his favour.

Mr. Malins and *Mr. Archibald Smith*, for the appellant. — Harriet Rackham died without issue in the testator's lifetime, after the date of his will. The cases settle that in these circumstances the gift over of her share takes effect; Jarman on Wills, (*a*) *Darrell* v. *Molesworth*, (*b*) *Ledsome* v. *Hickman*, (*c*) *Bretton* v. *Lethulier*, (*d*) *Willing* v. *Baine*, (*e*) *Walker* v. *Main*, (*g*) *Humphreys* v. *Howes*, (*h*) *Hannam* v. *Sims*. (*i*) The Vice-Chancellor proceeded on two grounds: first, that the gift over did not apply to a share of which there had been no previous enjoyment under the will; and, secondly, that a clause of accruer could not apply to the share of a child dying in the testator's life. Both these grounds are displaced by the authorities, which show that in cases of this description it is immaterial to the gift over *whether the prior taker has died before or after the testa- *77 tor's death, if he has died in such circumstances, that had he survived the testator the gift over would have taken effect. *Ive* v. *King*, (*k*) *Re Sheppard's Trust*, (*l*) *Re Green's Estate*. (*m*) The cases of *Bastin* v. *Watts* (*n*) and *Smith* v. *Oliver*, (*o*) are not consistent with the other authorities.

Mr. Green and *Mr. Edwin Ward*, in support of the decree, con-

(*a*) Vol. 2, p. 713–717.
(*b*) 2 Vern. 378.
(*c*) 2 Vern. 611.
(*d*) 2 Vern. 653.
(*e*) 3 P. Wms. 113.
(*g*) 1 Jac. & W. 1.
(*h*) 1 Russ. & My. 639.
(*i*) 2 De G. & J. 151.
(*k*) 16 Beav. 46.
(*l*) 1 K. & J. 269.
(*m*) 1 Drew. & Sm. 68.
(*n*) 3 Beav. 97.
(*o*) 11 Beav. 494.

tended that the cases cited by the appellant did not govern the present case. That the original gift here was to an unascertained class, who could not be ascertained during the life of the testator, whereas in those cases the original gift was to ascertained objects. They referred to *Rider* v. *Wager*, (*a*) *Shergold* v. *Boone*, (*b*) *Ive* v. *King*, (*c*) *Stewart* v. *Jones*, (*d*) and Jarman on Wills, (*e*) in addition to *Bastin* v. *Watts*, (*g*) and *Smith* v. *Oliver*. (*h*)

Mr. Archibald Smith, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — It appears to me that, on the letter and spirit of the instrument before us, independently of authority, and also on the great preponderance of authority, the words of the proviso upon which the present question depends ought to be read and understood as meaning and equivalent to, "Provided always, that if any one or more of my said sons and daughters shall, whether surviving or not surviving me, die * 78 without having any child, who, * under the trusts aforesaid, shall become absolutely entitled to a share of the said trust moneys, stocks, funds, and securities; then and in every such case," &c. I collect that the instrument was practically before the institution of the suit thus construed, and, if so, I think it was construed rightly, and carried into effect properly. Harriet Rackham was living at the date of the will, and for some years afterwards, and, in my opinion, the plaintiff, if entitled to any thing as heir-at-law or next of kin, is entitled to no more than he would have been if Harriet Rackham had survived the testator. I give no opinion whether her having died before the date of the will would have made any difference.

THE LORD JUSTICE TURNER.— I am of the same opinion. This is not a case of substitution, and the cases on substitution have no bearing upon it. It is a clear case of a gift to A. for life, and after her death to her children, with a gift over in case no child of hers should attain a vested interest. This limitation over, in my opinion, was well made, and has taken effect, although Harriet Rackham died in the lifetime of the testator.

(*a*) 2 P. Wms. 328.
(*b*) 13 Ves. 370.
(*c*) 16 Beav. 46.
(*d*) 3 De G. & J. 532.
(*e*) Vol. 2, p. 638 (2d edit.).
(*g*) 3 Beav. 97.
(*h*) 11 Beav. 494.

* *In re* BRETTLE. * 79

JOLLANDS *v.* BURDETT.

1864. February 19. Before the LORDS JUSTICES.

A testator gave his residuary personalty to trustees upon trust during the life of his daughter (a married woman), to pay the income "from time to time when and as the same shall be due and received, but not in the way of anticipation," into the proper hands of the daughter, for her separate use. The residuary estate consisted of a bond debt payable by instalments, and carrying interest which was payable once a-year: *Held*, that, although interest is for many purposes treated as accruing *de die in diem*, the daughter could not effectually assign an apportioned part of the interest for the current year up to the date of the assignment, but could only deal with the interest after it had become payable according to the terms of the bond.

THIS was a motion by way of appeal from a decision of the Master of the Rolls holding that an assignment by a married woman of the interest of a fund to which she was entitled for life, with a restraint on anticipation, operated to pass an apportioned part of the interest up to the date of the deed.

Alfred Brettle, by will dated the 13th of November, 1852, gave his residuary estate to trustees upon trust for conversion and investment, and then "upon trust that they or he the said trustees or trustee shall, during the life of the said Sophia Cunningham, pay the income of such last-mentioned trust moneys, stocks, funds, and securities from time to time when and as the same shall be due and received, but not in the way of anticipation, into the proper hands of her the said Sophia Cunningham for her sole and separate use and benefit, exclusively and independently of her said present or any future husband, and so as not to be subject or liable to or for his or their respective debts, control, interference, or engagements; and I declare that the receipts in writing of the said Sophia Cunningham shall alone, notwithstanding her coverture, from time to time as the same income shall become due, be effectual discharges for the same."

* By indenture dated the 23d of May, 1860, Sophia Cun- * 80
ningham assigned to J. Cruttwell, his executors, administrators, and assigns, all the interest and annual produce and the

moneys which had then "accrued and become payable to her" in respect of the residuary estate of the testator, by way of further charge for securing to Cruttwell, his executors, administrators, and assigns, the moneys due to him under certain other securities, and also some further advances.

At the time when this deed was executed the trust fund consisted of the unpaid part of a sum of 57,477*l.* 14*s.* due from the surviving partners of the testator, on a bond dated the 23d of October, 1857, in the penal sum of 120,000*l.*, conditioned to be void if the obligors should pay 57,477*l.* 14*s.*, with interest at 4*l.* per centum per annum from the 31st of October, 1856, in manner following, namely, 3829*l.* 17*s.* as and for one equal fifteenth part of the principal sum on the 31st of October, 1857, and the like sum of 3829*l.* 17*s.* on the 31st of October in every subsequent year until the whole of the principal should be discharged, and if the obligors should also pay on each 31st of October interest on the 57,477*l.* 14*s.*, or on so much thereof as for the time being should remain unpaid, after the rate of 4*l.* per centum per annum. There was also a branch of the condition enabling the obligors to pay off at earlier periods.

The year's interest payable on the 31st of October, 1860, amounted to about 1500*l.* The Master of the Rolls decided that an apportioned part of this, for the period between the 31st of October, 1859, and the 23d of May, 1860 (the date of the deed), passed to Cruttwell. Mrs. Cunningham appealed.

* 81 * *Mr. Selwyn* and *Mr. Beales*, for the appeal motion. — We contend that the deed did not purport to assign any interest but what was payable in the ordinary sense of the word at the time when the deed was executed. If, however, it did, we say that such assignment was ineffectual. The object of the restraint on anticipation is, that the married woman may not be able to deal with her income before it becomes receivable. The decision appealed from defeats this on a merely technical ground. The interest cannot be considered receivable until the time when payment of it could be enforced. *Hemsworth* v. *Campbell.* (*a*)

Mr. Osborne and *Mr. Colt*, for Cruttwell. — Interest accrues due *de die in diem*: *In re Rogers's Trusts*; (*b*) and at any time the

(*a*) 1 New R. 503. (*b*) 1 Drew. & Sm. 338.

interest accrued due up to that time must be considered as payable, though, owing to the terms of the contract, payment of it may not be capable of being enforced. Mrs. Cunningham, therefore, we contend was capable of assigning the interest accrued up to the 23d of May. The restraint on anticipation is satisfied by holding it to prevent dealings with interest not yet accrued.

Mr. Beales, in reply. — Interest cannot be treated as receivable when by no process of law could payment of it be enforced.

THE LORD JUSTICE KNIGHT BRUCE. — The interest on the debt in the present case was governed by a special contract, so as not to be demandable otherwise than on each 31st of October. Nothing could be demanded, or became, in any practical sense * due, on any intermediate day. The lady had an equitable * 82 interest for life in the debt, but subject to a restraint on anticipation, she being, as a *feme covert* may be, restrained from disposing of any thing not due and receivable. The word used is "received," which, in my judgment, ought not to be construed in its strict sense, so as to make the lady's power of disposition dependent on the accident whether the interest had been actually paid or not, but as meaning "receivable." The question is, whether, on the technical ground that interest is considered to accrue *de die in diem*, the object of the testator is to be defeated by treating this lady as having the power of virtually anticipating her income. I think that, as regards the interest for the period subsequent to the 31st of October, 1859, the deed (assuming that it purports to assign that interest) is to be considered as so much waste paper.

THE LORD JUSTICE TURNER. — With all respect to the Master of the Rolls, I differ from him in opinion on this case. His Honor came to the conclusion that the interest for the period from the 31st of October, 1859, to the 23d of May, 1860, was well assigned by the deed dated on the latter day. The first question to be considered is, whether this interest was or was not assignable. The trust in the testator's will was to pay the income "when and as the same should be due and received," but not in the way of anticipation, into the hands of Mrs. Cunningham. If the word "received" is to be taken in its strict meaning, no question can

arise, for this income clearly had not been received. But if the word is to be read (and I agree with my learned brother that it ought be read) as meaning "receivable," the expression must mean due and receivable according to the mode of payment
* 83 prescribed * by the instrument under which the interest is payable. Suppose a married woman entitled for life, with a restraint on anticipation, to the interest of a mortgage bringing in 5200*l.* a year, could it be held that she could in each week assign 100*l.* of it? To hold that she could, would, to a great extent, practically do away with the restraint on anticipation.

As we are of opinion that the interest was not assignable, it becomes immaterial whether the deed of 1860 purported to assign it; but I am of opinion that it did not. This interest had not "accrued and become payable to her" within the meaning of the deed, any more than it had become due and receivable within the meaning of the will.

JONES *v.* GREGORY.

1863. December 7. Before the LORDS JUSTICES.

A bill was filed by an heir-at-law to have a will of real estate cancelled, on the ground that it had been obtained by the direct fraud of persons taking a beneficial interest under it, of whom the principal defendant was one: *Held*, by the Lord Justice TURNER (the Lord Justice KNIGHT BRUCE doubting), that notwithstanding the Statutes 21 & 22 Vict. c. 27 (Sir Hugh M. CAIRNS's Act), and 25 & 26 Vict. c. 42 (Mr. Rolt's Act) the bill was demurrable, the plaintiff's remedy being only at law.[1]

THIS was an appeal by the plaintiff from an order of Vice-Chancellor STUART allowing a demurrer.

The bill was filed by the heir-at-law of William Jones, to set aside his will as having been obtained by fraud.

By this will dated the 29th of September, 1849, the testator bequeathed to his niece Elizabeth Dike 100*l.*; to his nephew Samuel Dike 1000*l.*; to another nephew S. Llewellyn 100*l.*; to his housekeeper Elizabeth Gregory 7500*l.*; to his housekeeper the

[1] See Jones *v.* Bolles, 9 Wallace (U. S.), 364; 1 Dan. Ch. Pr. (4th Am. ed.) 552; 1 Story Eq. Jur. §§ 184, 238; Gould *v.* Gould, 3 Story, 537; Gaines *v.* Chew, 2 How. (U. S.) 619; Kerr Inj. 31.

defendant Jane Gregory 5500*l.*; and to a charity 200*l.* After bequeathing * to Elizabeth Gregory certain chattels, he * 84 gave his residuary real and personal estate to Dr. Williams and the defendant T. P. Little, in trust to sell and to divide the proceeds between Elizabeth Gregory, Jane Gregory, and several other persons. The testator appointed Dr. Williams, the defendant Little, Elizabeth Gregory, and Jane Gregory executors.

The testator died in 1851, and the will was proved by the executors other than Dr. Williams, who refused to act. Elizabeth Gregory and Jane Gregory purchased from the trustees two houses in Stroud belonging to the testator. Elizabeth Gregory died in 1855, having disposed of her interest in them to Jane Gregory.

The bill, which was filed against Jane Gregory and T. P. Little, contained allegations, to the effect that the testator at the time when he made his will was bedridden and imbecile, and that Jane Gregory and Elizabeth Gregory were his only attendants, and that they had complete control over him and induced him to make this will when he was incapable of understanding its effect. The bill prayed that such part of the will as related to the two houses might be declared void and be cancelled, or, if necessary, an issue might be directed to try whether the testator's real estate was effectually devised by the will, or that the plaintiff might be at liberty to proceed by ejectment, and that the defendants might, if necessary, be restrained from selling the real estate and from receiving the rents, and for a receiver and further relief.

The defendants demurred to the bill, and the demurrer was allowed by the Vice-Chancellor STUART. A fuller statement of the allegations of the bill will be found in the report of the case before his Honor. (*a*) The plaintiff appealed.

* *Mr. Harding*, for the appellant. — The Court of Chancery * 85 anciently exercised a jurisdiction to set aside a will for fraud. *Lucas* v. *Burgess*, (*b*) *Munro*, *Acta Cancellariæ*, (*c*) *The Corporation of Feversham* v. *Parr*, (*d*) *Herbert* v. *Lowns*, (*e*) *Maundy* v. *Maundy*, (*g*) *Welby* v. *Thornagh*, (*h*) *Goss* v. *Tracy*. (*i*) This jurisdiction has not of late years been exercised, but it exists. *Andrews*

(*a*) 4 Giff. 468.
(*b*) Reg. Lib. 1573, A. fol. 7.
(*c*) Page 398.
(*d*) Reg. Lib. 1573, A. fol. 208.
(*e*) 1 Chanc. Rep. 12.
(*g*) 1 Chanc. Rep. 66.
(*h*) Prec. Ch. 123.
(*i*) 1 P. W. 287.

v. *Powys*, (*a*) *Kerrich* v. *Bransby*, (*b*) *Bennett* v. *Vade*, (*c*) which are commented on in *Middleton* v. *Sherburne*, (*d*), *Webb* v. *Claverden*, (*e*) *Bamesley* v. *Powell*, (*g*) *Pemberton* v. *Pemberton*, (*h*) *Armitage* v. *Wadsworth*, (*i*) *Jones* v. *Jones*, (*k*) *Scaife* v. *Scaife*, (*l*) *Tatham* v. *Wright*, (*m*) *Raworth* v. *Marriott*, (*n*) *Hopwood* v. *Lord Derby*. (*o*) It is established that a devisee may come to this Court to establish a will. *Boyse* v. *Rossborough*, (*p*) *Boyse* v. *Colclough*, (*q*) *Colclough* v. *Boyse*, (*r*) and there must be a correlative right in the heir to come to this Court to impeach it. The present Lord Chancellor, then Attorney-General, in the last-mentioned case, intimated a clear opinion that the jurisdiction existed. The Statute 21 & 22 Vict. c. 27 (Sir H. M. Cairns's Act), would give the Court jurisdiction even if it did not exist before; and the 25 & 26 Vict. c. 42 (Mr. Rolt's Act), renders it imperative on
* 86 the Court to try the question. *Re Hooper*, *Baylis* * v. *Watkins*. (*s*) More complete relief can be given here than at law, for the Court may order delivery up of the will. *Pemberton* v. *Pemberton*, (*t*) *Boyse* v. *Colclough*. (*q*) The prayer for a receiver is sufficient to support the bill, the property being in danger. *Lancashire* v. *Lancashire*, (*u*) *Bainbrigge* v. *Baddeley*, (*v*) *Montgomery* v. *Clarke*, (*w*) *Mordaunt* v. *Hooper*, (*x*) *Lloyd* v. *Passingham*. (*y*)

Mr. Charles Hall, for the defendants. — Whatever the reason may be, the Court, though it interferes on the ground of fraud in the case of other instruments, has for a long series of years disclaimed any jurisdiction to set aside a will on the ground of fraud, and the Court will not now set up such a jurisdiction in opposition to the whole current of authority for more than a century. The

(*a*) 2 Bro. P. C. 504.
(*b*) 7 Bro. P. C. 437.
(*c*) 2 Atk. 324.
(*d*) 4 Y. & C. 358.
(*e*) 2 Atk. 424.
(*g*) 1 Ves. 119.
(*h*) 13 Ves. 289, 297, 301, 302.
(*i*) 1 Mad. 189.
(*k*) 3 Mer. 161.
(*l*) 4 Russ. 309.
(*m*) 2 Russ. & M. 1.
(*n*) 1 M. & K. 643.
(*o*) 1 K. & J. 255.
(*p*) Kay, 71.
(*q*) 1 K. & J. 73.
(*r*) 6 H. L. Cas. 1.
(*s*) 11 W. R. 130.
(*t*) 13 Ves. 290.
(*u*) 9 Beav. 127.
(*v*) 3 Mac. & G. 419.
(*w*) 2 Atk. 378.
(*x*) Ambl. 311.
(*y*) 16 Ves. 59.

Acts of Parliament which have been referred to do not extend the jurisdiction of the Court so as to enable it to try a matter which, apart from those Acts, could not be brought before a Court of Equity at all. There is no allegation of waste in the bill, and so no case for a receiver. A bill to deliver up a will of real estate only might perhaps lie after the will had been decided at law to be bad, but not before. *Armitage* v. *Wadsworth*, (*a*) *Jones* v. *Jones*, (*b*) *Wright* v. *Wilkin*, (*c*) were all cases where actual fraud in obtaining the will was alleged.

Mr. Harding, in reply.

* THE LORD JUSTICE TURNER. — I am of opinion, that the de- * 87 cision of the Vice-Chancellor is correct. During my experience of the course of the Court, I have always understood that a bill by an heir-at-law against a devisee to set aside the will could not be sustained, even though the case were made that the devisee had obtained the will by direct fraud. It has been urged on the present occasion, that this Court has in early times exercised a jurisdiction in such cases, and that, therefore, such a jurisdiction must still exist. But the fact that such a jurisdiction was exercised in early and unsettled times, is not, in my opinion, a sufficient ground for acting in opposition to the later authorities, which have for many years regulated the course of the Court, and in which such a jurisdiction is disclaimed. The cases of *Andrews* v. *Powys*, (*d*) *Kerrich* v. *Bransby*, (*e*) *Bennett* v. *Vade*, (*g*) and *Webb* v. *Claverden*, (*h*) are decisive against the exercise of such a jurisdiction, and the more recent authorities of *Armitage* v. *Wadsworth*, (*i*) *Jones* v. *Jones*, (*b*) and *Wright* v. *Wilkin*, (*k*) support the same view. It has been argued that, as a devisee can come to this Court to establish a will, the heir must have a corresponding right to come here to set it aside; but that is not a necessary consequence, for a Court of Law has no jurisdiction to establish a will in favour of a devisee who is in possession, but an heir-at-law who seeks to recover the

(*a*) 1 Mad. 189.
(*b*) 3 Mer. 161.
(*c*) 4 De G. & J. 141.
(*d*) 2 Bro. P. C. 534.
(*e*) 7 Bro. P. C. 437.
(*g*) 2 Atk. 324.
(*h*) 2 Atk. 424.
(*i*) 1 Mad. 189.
(*k*) 4 De G. & J. 141.

devised estate on the ground of the invalidity of the will has an adequate remedy at law.

* 88 . Then, with respect to the recent statutes, I do not * find any thing in the Statute 21 & 22 Vict. c. 27 (Sir HUGH CAIRNS'S Act) which appears to me to bear upon the case. The only argument for bringing the case within the Statute 25 & 26 Vict. c. 42 (Mr. Rolt's Act) is that a Court of Equity has jurisdiction to order an instrument to be delivered up to be cancelled, and that, therefore, the Court must decide whether the will is valid, as being an intermediate question necessary to the decision of the question, whether it ought to be delivered up to be cancelled. In the present case the will cannot be ordered to be delivered up to be cancelled, for it is a will of personal as well as real estate, and has been admitted to probate by the Ecclesiastical Court as a good will of personalty.[1] But, apart from this, the case appears to me to be disposed of by the 4th section of the Act, which provides that in cases in which the object of a suit in equity is to recover the possession of land under a legal title, such relief only shall be given in equity as would have been proper according to the rules and practice of the Court if the Act had not passed. Now the object of the present suit is to recover the possession of land under a legal title, and it, therefore, lies on the plaintiff to show that the relief which he seeks would have been proper if Mr. Rolt's Act had not passed. I am of opinion, therefore, that this bill is not sustainable.

THE LORD JUSTICE KNIGHT BRUCE. — I acknowledge myself not wholly free from doubt, whether, having regard to the present state of the statute law, the allegation, that the will was obtained by the direct fraud of persons, of whom the principal defendant is one, is not sufficient to sustain the bill. The opinion, however, of the Lord Justice, which is very probably right, being against the bill, renders this doubt immaterial.

[1] See Boyse *v.* Rossborough, 3 De G., M. & G. 817, note (1).

*In the Matter of F——, an alleged Lunatic. . *89

1863. December 18. Before the LORDS JUSTICES.

A gentleman was placed under restraint by his relations as being incapable of managing his affairs. He had previously had temporary fits of mental aberration, from which he had recovered. His wife, who was living separate from him, on hearing of this attack, sent medical men to inquire into his state, but they were not allowed to see him, nor was she allowed any communication with him. She thereupon took proceedings in lunacy. The husband in a few months recovered: *Held*, that the wife's costs of the proceedings ought to be paid by the husband.

IN March, 1863, the brother and sister of the alleged lunatic removed him to a house which they took for him, and placed him under personal restraint as being incapable of managing his affairs. He had previously had temporary attacks of mental aberration, from which he had always recovered. On the present occasion his wife, who was living separate from him, sent two medical men to visit him, but the brother refused to allow either of them to see the alleged lunatic, nor was his wife allowed to have any communication with him. She thereupon presented a petition for an inquiry into the state of his mind.

On the 18th of June, 1863, the petition came on to be heard, and it was admitted that the alleged lunatic was at that time of unsound mind, but it was contended that there was good reason to believe that the unsoundness would, as before, be only of short duration. Their Lordships thereupon ordered the petition to stand over, and gave directions that one of the medical officers of the Court should see the alleged lunatic shortly before it came on again. This was done, and the medical officer being of opinion that there was now no unsoundness of mind, and that the alleged lunatic had completely recovered, the only question upon the petition now coming on again was as to the costs of the petitioner.

Mr. Waller, for the petitioner, referred to the 11th section of the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), and contended that the intention of the *legislature was to in- *90
demnify all persons who, on reasonable grounds, took proceedings to protect the person and property of a person supposed

to be a lunatic. It was impossible to say that Mrs. F—— had not reasonable grounds for her proceedings when her husband was placed under restraint, and all opportunity of ascertaining his state was denied her. Her costs, therefore, ought to be paid out of the husband's estate.

Mr. Bedwell, contrà.

THE LORD JUSTICE KNIGHT BRUCE. — We are of opinion, that this is a case in which the petitioner's costs ought to be paid out of the alleged lunatic's estate.

THE LORD JUSTICE TURNER. — The Court ought not, in my opinion, to be astute in discovering grounds for depriving persons who commence proceedings in lunacy of their costs, if they had fair reason for believing that the persons whose sanity is to be inquired into were in such a state as to require the intervention of the Court to protect their persons and property.

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* 91 * *Re* HOOPER.

BAYLIS *v.* WATKINS.[1]

1864. January 14, 15, 16, 18, 23. Before the LORDS JUSTICES.

A solicitor, who had been employed by a married woman to conduct a suit for judicial separation, which suit ended in a compromise, claimed to prove as a creditor against the estate of the husband for his costs, as necessaries supplied to the wife. The Court being of opinion that there was no reasonable ground for the suit, and that the solicitor, though he believed that there was, might by making proper inquiries have ascertained that there was not: *Held*, that in these circumstances the claim could not be sustained.

Per the Lord Justice TURNER. Whether even if the solicitor had after making proper inquiries had reasonable cause for his belief that there were good grounds for instituting the suit, he could have maintained his claim, when it ultimately turned out that the wife had not any such case as would entitle her to a separation, *quære*?[2]

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[1] See S. C., 3 De G., J. & S. 348.

[2] See 1 Chitty Contr. (11th Am. ed.) 171, 172. The legal expenses incurred

THE question in this case was, whether the costs of Mr. Clarke, a solicitor, who had been employed by Mrs. Hooper to conduct a suit for judicial separation against her husband, ought to be allowed as a debt against the husband's estate.

The suit in the Divorce Court was commenced on the 3d February, 1859, on the ground of alleged cruelty. Mr. Hooper, under an order of the Divorce Court, paid into that court 250*l.* to answer costs. On the 16th of June, 1859, the suit came on to be heard, but by consent the record was withdrawn, the parties agreeing to a separation, for which purpose a deed was to be prepared, Mr. Hooper undertaking to allow a yearly sum for maintenance. (*a*) The 250*l.* was paid to Mr. Clarke on account of his costs. Mr. Hooper died in 1861, and the present suit was instituted by summons for the administration of his estate, and an order made. Under this order Mr. Clarke came in to prove as a creditor for his costs over and above the 250*l.*, on the ground that the husband was liable to the costs of the proceedings in the Divorce Court as necessaries supplied to his wife. The executors, on the other hand, contended that those * proceedings had been taken * 92 without any reasonable ground, and that if Mr. Hooper had not for the sake of peace consented to a compromise, the suit must certainly have failed.

A great mass of evidence was entered into upon the question, whether there was reasonable ground for the institution of the proceedings. It is not considered necessary to enter into any particulars of this evidence, it being sufficient to state that it appeared

by a deserted wife — (1) preliminary and incidental to a suit for restitution of conjugal rights; (2) in obtaining counsel's opinion on the effect of an antenuptial agreement for a settlement; (3) in obtaining professional advice as to the proper mode (*a*) of dealing with tradespeople who were pressing her to pay them for various necessary articles supplied to her since she had been deserted, and also (*b*) of preventing a distress threatened on furniture, belonging to her husband, in the house she occupied — are necessaries for which she has implied authority to pledge his credit during his lifetime, and for which, after his death, his executors are therefore liable. Wilson *v.* Ford, L. R. 3 Exch. 63. But in some States it has been held that a husband is not liable to an attorney for professional services rendered to his wife in defending against a petition for divorce, preferred by him, or in procuring a divorce on her petition. Wing *v.* Hurlburt, 15 Vt. 607; Dorsey *v.* Goodenow, Wright, 120; Coffin *v.* Dunham, 8 Cush. 404; Ray *v.* Adden, 50 N. H. 82; Morrison *v.* Holt, 42 N. H. 478; Johnson *v.* Williams, 3 Iowa, 97; Shelton *v.* Pendleton, 18 Conn. 417.

(*a*) See 1 Swab. & T. 602.

to establish the following points: that Mrs. Hooper was, if not insane, at all events on the borders of insanity, and the charges made by her against her husband almost entirely the product of her own imagination; that there had been no conduct on the part of Mr. Hooper which could make the institution of the suit for separation a reasonable or proper proceeding; that Mr. Clarke in undertaking the case appeared to have relied on the statements of Mrs. Hooper, and of the persons to whom she referred him, without taking any steps to ascertain whether Mrs. Hooper was of sound mind, though he knew that her sanity was disputed, and without making inquiries of any other persons than those to whom she referred him as to the alleged cruelty, though he knew that there were other persons who could give him information.

The case came before the Court on an application to vary the chief clerk's certificate.

Mr. Greene and *Mr. Osborne Morgan*, for Mr. Clarke. — A wife has implied authority to pledge her husband's credit for necessaries supplied to her, and the services of a solicitor in proceedings of this nature are necessaries. The solicitor employed by the wife became by her retainer the husband's solicitor, and the
* 93 husband is liable, * provided the institution of the proceedings was reasonable. *Shepherd* v. *Mackoul*, (*a*) *Turner* v. *Rookes*, (*b*) *Brown* v. *Ackroyd*. (*c*) That there was reasonable ground for the proceedings is shown by the compromise in which they resulted, the wife thereby obtaining a separation and maintenance. It is contended on the other side, that the 250*l*. paid into the Divorce Court is the measure of the husband's liability. *Sopwith* v. *Sopwith*. (*d*) But that is only where the suit fails, and here it has not failed. *Allen* v. *D'Arcy*. (*e*) The Divorce Court only allows costs as between party and party, and that there is a right in the wife to get her costs in that Court is no answer to an action by the wife's solicitor for his costs. *Rice* v. *Shepherd*. (*g*)

Mr. Malins and *Mr. Cracknall*, for the executors. — The costs cannot be necessaries, unless there was just ground for litigation. Here there was no reasonable ground at all for the divorce suit;

(*a*) 3 Campb. 326.
(*b*) 10 Ad. & Ell. 47.
(*c*) 5 E. & B. 819, 827.
(*d*) 2 Sw. & T. 105.
(*e*) 2 Sw. & T. 107.
(*g*) 12 C. B. (N. S.) 332.

the wife was under insane delusions as to the conduct of her husband; and if the solicitor had made all the inquiries which he ought to have made, he would have seen that a suit ought not to have been instituted. The solicitor was bound to act with prudence, and make full inquiry as to accuracy of the statements made to him by the wife. *Brown* v. *Ackroyd*. (*a*) It is said that Clarke became the solicitor of Mr. Hooper. If that be so, he has got all he is entitled to. *Sopwith* v. *Sopwith* (*b*) shows that Mr. Hooper was not liable beyond the 250*l*. The taxation of costs in the Court in which the litigation took place is final. In *Rice* v. *Shepherd* (*c*) there had not been any taxation. * The husband * 94 is liable only for reasonable costs of the litigation, and the Court in which the proceedings took place is the proper forum for determining what costs were reasonable, and has determined it. That the solicitor believed that there was a reasonable case for instituting proceedings is not enough; the party suing for necessaries supplied to a married woman must prove to the Court that they were necessaries, not merely that he believed and had reasonable ground to believe that they were so: *Manby* v. *Scott*; (*d*) and even if his belief could be sufficient, it must be a belief founded on proper and sufficient inquiry. [*Biffin* v. *Bignell* (*e*) was also referred to.]

Mr. Greene, in reply. — The question is, whether Clarke had reasonable grounds to justify the institution of proceedings after doing what he could to ascertain the truth of the wife's case. If he had, he is entitled to recover. The principle of the cases is, that although the suit may fail, yet, if there was reasonable ground for instituting it, the retainer will be considered to be the retainer of the husband. The claim cannot be barred on the ground of the costs being cognizable only in the Divorce Court; the Divorce Court never gives full costs, but only costs as between party and party, whereas the right of the solicitor is, to be paid by the husband all costs to which he would have been entitled if the husband had retained him.

Judgment reserved.

(*a*) 5 E. & B. 819, 827.
(*b*) 2 Sw. & T. 105.
(*c*) 12 C. B. (N. S.) 332.
(*d*) 2 Smith Lead. Cas. 375 (5th ed.).
(*e*) 7 H. & N. 877.

January 23.

* 95 *THE LORD JUSTICE KNIGHT BRUCE. — In this case Mr. Clarke, a London solicitor, who was instructed and employed by Mrs. Hooper, then a married woman but now a widow, to institute and carry on proceedings in the Divorce Court for a judicial separation against her husband, also a London solicitor, on the alleged ground of cruelty, and who asserts, and I assume truly, that part of the costs so incurred remains unpaid, claims the unpaid portion of those costs from the estate of the deceased husband, on the ground that he, Mr. Clarke, had a right as against the husband to consider her as justifiable in the institution of the suit, and that Mr. Clarke's assistance to her, and the expense, or portions at least of the expense, incurred on her behalf in it and concerning it, ought to be deemed necessaries properly supplied to her, and to be charged accordingly to the husband. His executors resist the demand, and it is proper, I think, if not necessary, for us to pronounce our opinions upon the question, whether the cruelty suit, which was compromised in Mr. Hooper's lifetime, was instituted by her on such grounds as that she would probably or properly have succeeded in it (opposed as it was by him) if it had not been compromised, but had been adversely prosecuted to a regular termination. Having considered that question with the aid of all the evidence before us, and the able and prolonged (I do not say too long) arguments of the learned counsel engaged, I have come to the conclusion that it ought to be answered in the husband's favour. The point, indeed, is one upon which, in my judgment, not a rational doubt can be entertained. The marriage was previous to the year 1840, and a separation by agreement afterwards took place some time before the year 1857, which separation ended in April, 1857, also by agreement; and from some time in April, 1857, Mr. and
* 96 Mrs. Hooper * lived together until the 27th of December, 1858, when she again and finally quitted him, and the suit was commenced very early in 1859. Now, as to cruelty, if any, before the first separation or before the reconciliation of 1857, when the husband and wife came together again, that reconciliation cannot be regarded as an irrelevant matter, unless indeed, perhaps, when they so came together again she was in a state of insanity, which possibly she was. I consider it, however, right to state my opinion upon the question whether any cruelty on his

part previous to the first separation or to the reconciliation is proved, and my opinion upon that point clearly is, that not any cruelty of any kind, whether in France or elsewhere, is proved to have taken place on his part before the first separation or the reconciliation. Then, as to the time not previous to the reconciliation, the evidence perfectly satisfies me also that there was not cruelty on his part of any kind; that when she left him finally in December, 1858, she did so without justification, and without excuse, if sane, and that the suit, considered as instituted by a sane woman, was a censurable and worse than frivolous proceeding on her part.

The claimant before us, however, contends that all this, whether well or ill founded in fact, is of little or no moment as regards his demand against the husband's estate. For the claimant says, that, in acting as he did professionally for the wife, he acted and proceeded in good faith, thinking it reasonably possible, nor at all improbable, that she would justly or might fairly succeed adversely in the suit if prosecuted to a regular termination. This proposition, which is denied by the husband's executors, is perhaps material, and assuming it to be so, I address myself to it and to the controversy upon it accordingly. The written statement laid by the claimant before the lady's counsel, *Mr. Macqueen*, on
* her behalf ere the suit was begun, has been produced here, * 97
and we have seen it, — a statement containing some very remarkable expressions certainly; coupled with the rest of the evidence, I am thoroughly convinced by it that during the interviews, more than ten I think in number, which in October, 1858, took place between the claimant and Mrs. Hooper on the subject of her alleged grievances, her representations, language, and demeanour must have been such as to render the exercise of great caution, and a considerable degree of doubt as to the accuracy of those representations, a positive duty on his part as between him and her husband. I am satisfied that they ought to have induced the claimant to pause, and not to commence litigation without taking much more pains to investigate the matter and ascertain the truth of the case than he appears to have done. He did not, in my opinion, take the steps which it was incumbent on a professional man, consulted as he was consulted, if desirous to do his duty and intending to act fairly, to take. For every purpose of the present dispute there must, I think, be substantially imputed to

him the possession of the knowledge which, in my opinion, he might and ought to have acquired, and which, if he had acquired, the institution of the suit must, I conceive, or ought to, have appeared to him a highly improper measure. On the grounds that I have stated then, without giving an opinion upon the other grounds alleged (whether without or with good reason) to be fatal to his demand, I declare my conclusion to be, that the claim, not in the least aided, as it appears to me, by the compromise of the litigation, fails entirely. The claimant has not, in my judgment, shown himself to be, and must, as I conceive, be taken not to be, a creditor of the late Mr. Hooper, who seems to me to have been a man most painfully perplexed and, indeed, afflicted by his wife, *98 whether she was in or out of her senses, — my impression * from the evidence, however, being that during portions at least of the time that has been brought under our attention she was insane. I may add that what I have just said as to the compromise is founded in part at least on the consideration, not only that it was important to the husband's peace and comfort that the wife should be kept separate from him, but also that, if desirous or willing to live with him again, or insane, he was under a legal obligation to maintain her, either in his own house or otherwise. I think that the claimant should pay to the executors at least some costs, though possibly not the whole that his demand has occasioned to them.

THE LORD JUSTICE TURNER. — This case has been argued at great length and presented to us in many points of view, but after fully considering it, I am satisfied that it may well be disposed of on the single point whether, at the time of the institution of the suit for judicial separation, there was reasonable ground for instituting it, this point necessarily involving the consideration of what is to be considered as reasonable ground for instituting such a suit. On this point only, therefore, do I think it necessary to give any opinion. Now if this point is to be determined according to the facts as they stand in evidence before us on this motion, there cannot, as it seems to me, be any doubt whatever upon the case, it being simply impossible to say upon the evidence as it stands before us that there was reasonable ground for instituting the suit.

It has been contended, however, on the part of the appellant, that the case ought not to be decided according to the evidence as

it now stands before us, but ought to be looked at in this point of view, whether the appellant, having made due inquiry, had reason to expect that the * suit would succeed. Possibly this * 99 may be the right view of the case, but I am not satisfied that it is. It is, however, the view most favourable to the appellant, and I therefore adopt it. I think, however, that the appellant's claim is not in any respect bettered by the case being thus looked at. This is, in effect, an action by an attorney to recover the costs of a suit instituted by his client against her husband in the Divorce Court; and it seems to me that he is bound to show that he took proper proceedings to ascertain the merits of the case before he instituted the suit. Now the appellant knew that insanity was imputed to this lady, — he had before him certificates of medical men supporting this imputation, — yet he took and acted on representations of the lady, whose insanity he knew to be impeached, and took no steps to ascertain whether the allegations of insanity were well founded or not. The opinion of counsel taken by him was relied on, but the opinion of counsel must proceed on the facts stated to him, and here the statement was wholly *ex parte*. It is the duty of the attorney, not of counsel, to ascertain the truth of the facts on which the opinion is taken. The opinion therefore affords, in my opinion, no justification. The appellant made no inquiries of any other persons than those to whom the wife referred him. The evidence put in by him proves that he knew that there were persons who could give him information, yet it does not appear that he made inquiries of any of them. It is said that they were friends of the husband, but it does not appear that the appellant had any reason for thinking so beyond the statement of this unfortunate lady, whose sanity he knew to be in question.

It has been urged that it is not material whether the suit would have succeeded or not, if the appellant thought that there were reasonable grounds for instituting it; but I am not satisfied as to this, for the foundation of the * claim, on the part * 100 of the attorney, is the right of the wife to pledge the husband's credit for necessaries supplied to her, and if the suit failed, it would seem that the expenses of conducting it cannot be considered to be necessaries. In the ordinary cases of actions for necessaries supplied to a wife, the Court, as I understand the course at common law, looks to the question, whether, on the proofs as they stand at the time of the trial, the things supplied

were necessaries, not to the question, whether, at the time when they were supplied, the person who supplied them had reasonable grounds for thinking that they were so. It is unnecessary, however, in the present case, to decide whether, if the solicitor, after making proper inquiries, had reasonable ground for believing that the suit would be successful, he could have sustained his present claim, though the suit in the result proved to be unsuccessful; and I do not give any final opinion on that question, for I am of opinion that if the appellant had made proper inquiries he would have found that there was no reasonable ground for instituting the suit.

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* 101 * In the Matter of The WATERLOO LIFE, EDUCATION, CASUALTY, AND SELF-RELIEF ASSURANCE COMPANY;

AND

In the Matter of The JOINT-STOCK COMPANIES ACT, 1862.

SAUNDERS'S CASE.

1864. January 12, 13. February 12. Before the LORDS JUSTICES.

S., the local manager of a company, was asked by the general manager to become a director, the qualification for which was the holding 500 shares. 500 shares held by the manager as a trustee for the company were transferred to S. by deed, which S. also executed. He acted as director, but he was not registered as a shareholder, never received any notice of dividends, continued to be local manager, and never paid the price which was expressed in the deed of transfer to be paid for the shares, nor appeared to have been treated as a shareholder, and the Court was satisfied on the evidence that he had never agreed to purchase the shares, but that they were transferred to him by order of the directors merely to qualify him for the directorship: *Held*, that if the company, which could not be bound by the transaction, elected to affirm it, S. was only a trustee for the company, and so not a contributory; and that if they elected to disaffirm it, then, it not appearing that S. was privy to the breach of duty on the part of the directors, it must be rescinded altogether, and that S. therefore was not a contributory.

THE object of this appeal was to place the name of Mr. G. L. Saunders on the list of contributories.

The company was established in 1851 under the Acts then in force. According to the deed of settlement no person holding any

place of profit under the company could be a director, and the necessary qualification for a director was the holding at least 500 shares for at least three months before his election.

Mr. Saunders was originally an agent of the company for the neighbourhood of Sheffield. In April, 1855, he was designated local manager, and in 1861 received the title of district manager. He received a salary of about 300*l.* a year. It appeared that he had exerted himself very zealously in promoting the objects of the company, but he was not a shareholder. On the 29th of October, *1861, as appeared by the minute-book, the direc- *102 tors passed a resolution for appointing him a director. This, if actually done on that day, was without his knowledge, and on the following day, 30th October, Thomas George Williams the younger, the manager of the company, wrote to him thus:—

"Dear Sir,—What say you to becoming a director of the Waterloo? There is a vacancy, and such is to be filled, and I believe all parties would welcome you as such. 500 shares qualify. I will not fetter your judgment by adding any comment."

On the 31st Mr. Saunders wrote a letter in reply, expressing his sense of the honour conferred upon him by the proposal, but declined on the ground that he did not see his way to pay for the 500 shares.

On the 2d of November Mr. Williams answered by a letter, the material part of which was as follows:—

"From your note I gather that the qualification is the only matter for consideration with you in determining the question put to you in my note of the 29th ult. If this is so, I think we can get over that with little difficulty."

It appeared that long previous to 1861 the company had purchased from some of its shareholders 610 shares, and these shares had been transferred into the name of Mr. Williams, who held them on behalf of the company. Mr. Williams deposed that after Mr. Saunders had been elected the directors instructed him to transfer 520 of these shares to Mr. Saunders; that he did so accordingly, and sent the transfer deed to Mr. Saunders in a letter

dated the 5th of November, which letter, so far as is material, was as follows:—

"I have very great pleasure in informing you that you
* 103 * have been elected a director of this company by the unanimous vote of the board. I thank you for your note of the 3d inst. on this subject, and for your kind expressions of regard for me personally. Our meeting is not yet fixed; it will be in November; and I will let you know as early as possible the day named, so that you may at least attend a board or two before the meeting. Will you have the kindness to sign and return to me the enclosed transfer, so that I may have this matter quite regular."

The letter of the 3d of November referred to above was not forthcoming, and there was not any evidence of its contents. By the deed of transfer T. G. Williams, in consideration of 100*l.* therein mentioned to be paid to him by Saunders, transferred the shares to Saunders to hold to him, his executors, administrators, and assigns, subject to the several conditions on which Williams held the same, and Saunders thereby agreed to take the shares subject to the same conditions and to the provisions of the deed of settlement of the company. The above is the whole substance of the deed, which did not contain any agreement by Saunders with the company or any person on its behalf. Saunders executed it and returned it. He at the same time wrote to Mr. Williams a letter, which was in part as follows:—

"Be good enough to return my most sincere thanks to the chairman and board of directors of the Waterloo for the kind manner in which they have elected me a director of the company. . . . You may depend upon my sincerity when I state my great desire to render every assistance to the directors of the Waterloo Company, and to relieve you, if possible, of some of your anxiety."

A transfer of the 520 shares to Mr. Saunders was
* 104 * entered in the transfer books of the company under the date of the 20th of April, 1861, a date long previous to the first proposal to Mr. Saunders to become a director. He

never executed the deed of settlement, nor was his name ever entered on the register of shareholders, or included in the returns of shareholders made to the registrar of joint-stock companies. It appeared probable that the entry in the transfer book had been antedated to meet the requisition of the deed of settlement, that a director must have held the 500 shares for three months before his election.

On or about the 14th of February, 1862, Mr. Williams, wishing to have some evidence to show that he had not received from Mr. Saunders the 100*l.* mentioned in the deed of transfer, wrote to him for an acknowledgment to that effect, and Mr. Saunders on the 15th wrote back as follows:—

"I send this note to certify that I have not paid the 100*l.* which appears as the consideration given by myself to you for the purchase of 520 Waterloo shares, and is so entered in the transfer."

Mr. Saunders attended seven meetings of the board of directors, and claimed the attendance money usually received by directors who attended meetings; but he never received any share certificates, nor were notices sent to him as a shareholder. A dividend of 6*l.* per cent was paid in January, 1862, on the shares in the company, but he neither received any notice of it nor any money on account of it. He never paid any thing in respect of the shares, and never ceased to be district manager.

On the 6th of December, 1862, an order was made for winding up the company.

* The case originally came before the Master of the Rolls * 105 upon evidence, the result of which was to the above effect, with this exception, that the deed of transfer was not forthcoming, and there was no evidence that Mr. Saunders had ever executed it, beyond the affidavit of Mr. Williams, that he had sent the transfer to Mr. Saunders as mentioned above, and that it had been duly returned to him signed and accepted by Mr. Saunders. Mr. Saunders, in addition to deposing to the various facts stated above as tending to show that he had not been treated as a shareholder, deposed that he had been recently informed by his solicitor of the minute of the 29th of October, 1861, that, if the resolution was passed on that day, it was passed without his

having been consulted; that about the 4th or 5th of November, 1861, he was informed by Mr. Williams of his appointment as director; that he was not informed what had been done about his qualification, and believed he had been appointed by reason of his services and of the use he could be to the company; that he only became a director on the solicitation of Mr. Williams; that he never authorized Mr. Williams or anybody else to transfer shares into his name, either for the purpose of qualifying him to be a director or for any other purpose; that, to the best of his knowledge, recollection, and belief, he had never seen the deed of settlement of the company; that certainly he had never read it, or any copy of it, and that he had not been acquainted with any of its provisions until within the last few weeks, when he had been informed of them by his legal advisers; that he claimed the money for attendance as director, because he had understood from Mr. Williams that he was to be remunerated for his loss of time and for being taken away from his business; that if he had been aware of the clause in the deed of settlement, that no one
* 106 holding an * office of profit under the company could be a director, he would never have consented to become a director, and that, if he had discovered that clause after his appointment, he should immediately have resigned the office of director. He further said: "I never was a candidate for the office, and should never have consented to become a director, if the fact that I was to be a holder of 500 shares in the company had been explained to me, or if I had been informed of the real mode in which the difficulty arising from my not being a shareholder was to be got over." He stated also that he had never applied for or intended to take shares, and never accepted or intended to accept any; that he never considered himself, nor, as he believed, ever was considered, either by Mr. Williams or by any one else, as the owner of any shares in the company, and that he believed it never was intended that he should have any real right or interest in or benefit from or power over the shares, and that, to the best of his belief, he never executed any deed of transfer of any shares in the company.

The case coming before the Master of the Rolls upon these materials, his Honor decided that there was not sufficient evidence of a transfer to Mr. Saunders, and that his name ought not to be on the list of contributories; and this decision was on the 10th of

December, 1863, affirmed by the Lords Justices. Shortly after this, the deed of transfer, which, as it appeared, had never come into the possession of the official liquidator, but had been in the hands of Mr. Williams, was produced, and the official liquidator applied to the Lords Justices to have the case again reheard. This application was granted without prejudice to the respondent urging again the objection that it was not a proper case for granting a second rehearing.

* *Mr. Baggallay* and *Mr. Swanston*, for the official liquida- * 107
tors, in support of the appeal motion. — The transfer to Saunders being now clearly proved, he must be held liable as a shareholder. The qualification of a director was the holding 500 shares. Saunders accepted the shares, attended meetings as a director, and received fees for such attendances.

Mr. Selwyn and *Mr. Lindley*, for Saunders. — Mr. Saunders never was a shareholder, whether we look at the form or at the substance of the transaction. He never received dividends, and it is clear that he never became entitled to receive them. A transfer alone gave him no title to capital or profits, execution of the deed of settlement being a necessary preliminary. A transfer was made to him as a colorable proceeding, that he might be qualified to be a director; but he was never told that his being a director was incompatible with his holding his office of local manager. The transfer never was acted upon. He never received a certificate of ownership, nor was returned as a shareholder, nor received profits. Two persons cannot be on the list for the same shares, and, according to *Humby's Case*, (*a*) Williams is still liable. Saunders, therefore, is not. He is not liable to creditors. *Moss* v. *Steam Gondola Company*, (*b*) *Bailey* v. *The Universal Provident Assurance Company*. (*c*) Williams being manager, was bound to see to the regularity of the transfer from him: *Brown's Case*; (*d*) and he, therefore, is more clearly liable than an ordinary transferor, whose transfer is incomplete, would be. The principle of specific performance cannot apply, Saunders clearly never having entered into any contract for value to take shares.

(*a*) 5 Jur. (N. S.) 214.
(*b*) 17 C. B. 180.
(*c*) 1 C. B. (N. S.) 557.
(*d*) 19 Beav. 97.

* 108 * *Mr. Baggallay*, in reply. — The transfer contains a covenant to observe the stipulations of the deed of settlement; this satisfies the provisions as to executing the deed of settlement, or a deed of acceptance. The omission of registry does not affect the validity of the transfer. In *Bunn's Case* (*a*) and *Humby's Case* (*b*) there was no transfer, but only an agreement, clogged with a condition which could not be performed. Saunders may have been a trustee as between him and Williams, but the company is not bound to regard trusts; and, therefore, in the present contest, which is between Saunders and the company, Saunders must be regarded as the shareholder.

Judgment reserved.

February 12.

The Lord Justice TURNER, after stating the facts and entering at length into the evidence, proceeded as follows: —

It was, in the first place, objected on the part of the respondent, that this was not a proper case for granting a second rehearing, but I do not think there has been any such want of reasonable diligence on the part of the official liquidator as could have justified us in refusing to rehear the case on the discovery of the new evidence. The document now produced was in the possession, not of the official liquidator, but of Thomas George Williams the younger, the witness on his behalf, and no blame can, I think, fairly be imputed to the official liquidator for its not having been sooner produced. The case, therefore, ought, in my opinion, to be disposed of on the merits as they now stand before us. It
* 109 was strongly * argued on the part of the respondent, Mr. Saunders, that, notwithstanding this deed of transfer, he never became a shareholder in the company, and various provisions of the deed of settlement of the company, and of the Statute 7 & 8 Vict. c. 110, were referred to in support of his view. But to this it was answered, on the part of the official liquidator, that whether enough had or had not been done to constitute the repsondent the owner of the shares as between him and Thomas George Williams the younger, enough had been done to constitute

(*a*) 2 De G., F. & J. 275. (*b*) 5 Jur. (N. S.) 215, V. C. K.

him a shareholder as between him and the company. I do not, however, think it necessary to enter fully into this part of the argument. It is abundantly clear that the provisions of the deed and of the statute have not been observed, and whether the non-observance of them has or has not been such as to prevent the respondent, Mr. Saunders, from having become a shareholder in the company, it has, at all events, been such as to show that this transaction was not what it appears upon the face of it to have been, and to render it incumbent on the Court to search closely into the facts of the case, in order to find what the transaction really was. It is much to be regretted, that in the internal affairs of joint-stock companies we find such frequent and lamentable departures from an honest and straightforward course, that we can never be surprised at finding that any of their transactions are in reality quite different from what they are made to appear. Now as the case stands upon the evidence (which, it is to be observed, is still imperfect, for the letter from Thomas George Williams the younger of the 5th of November refers to a letter from the respondent of the 3d of November, which is not produced), I think the fair and just conclusion to be drawn is, that there never was in fact any thing like a sale of the 520 shares in question to the respondent George Leman Saunders, but that those
* shares, belonging, as they appear to have done, to the *110
company, were transferred, by the order of the directors,
into the name of the respondent, in order to qualify him for the directorship. The respondent would then become a trustee of the shares for the company as Williams had previously been. How then would the case stand as between the company and the respondent? The company, of course, could not be bound by such a transaction. They might adopt or repudiate it. Supposing them to adopt it, they certainly could not insist on their own trustee being put upon the list of contributories. Supposing them, on the other hand, to repudiate it, would it not be open to the respondent to say that the transaction must be undone *in toto*; that the company could not affirm the transaction in part and disaffirm it in part? I think it would. It might, indeed, be otherwise, if it was shown on the part of the company that the respondent was party or privy to the breach of trust or duty on the part of the directors in directing the transfer to be made. But I am satisfied upon the evidence that this was not the case, and that the

respondent did not, in truth, know how these shares were provided for his qualification. Upon this ground, therefore, I am of opinion that this motion ought to be refused; but, having regard to the positive statement made by the respondent, as to there having been no transfer of shares to him, I think he has no just ground to complain of the case having been again brought before us, and that the motion therefore should be refused without costs.

THE LORD JUSTICE KNIGHT BRUCE. — I agree.

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111 * CHAPPELL *v.* GREGORY.

1864. March 1, 2. Before the LORDS JUSTICES.

The general rule of the Court is, that there cannot be a rehearing for costs alone, unless some principle is involved in the mode of dealing with them, and it is only in extreme cases that the Court will rehear the merits on the question of costs.[1]

THIS was an appeal by the defendant from so much of a decree of the Master of the Rolls as ordered him to pay the costs of the suit.

The case made by the bill was, that the defendant verbally agreed to take a lease from the plaintiff of a dwelling-house upon the terms contained in a letter of the 11th of December, written by the plaintiff's agent to the defendant; that the defendant was let into possession, but had neglected to return the draft lease which was sent him; that the defendant set up a claim on account of an alleged verbal promise by the plaintiff's agent that certain repairs should be done to the house; that no such promise had been made, and no repairs were wanted; and that the defendant refused to pay the rent which had become due, or to accept a lease. And the bill prayed that the defendant might be decreed specifically to perform the agreement; but if the Court should be of opinion that the agreement could not or ought not to be specifically performed, then

[1] See Perks *v.* Stothert, 11 W. R. 1016, V. C. K.; Hope *v.* Carnegie, L. R. 4 Ch. Ap. 264, 265; 2 Dan. Ch. Pr. (4th Am. ed.) 1463, and note (2), 1464.

that it might be delivered up to be cancelled, and that the defendant might be ordered to give up possession of the house to the plaintiff, and pay her a fair occupation rent for the time he should have held possession.

The defendant by his answer insisted on his right to specific performance, and to have the repairs done by the plaintiff according to the alleged verbal promise.

The Master of the Rolls declined to grant the plaintiff * specific performance, but made a decree ordering the * 112 defendant to give up possession, fixing him with an occupation rent, and ordering him to pay the costs of the suit. The defendant appealed from this order as to costs.

Mr. Southgate and *Mr. Everitt*, for the appellant.

Mr. Selwyn and *Mr. Jessel*, for the plaintiff.

[*Chappell* v. *Purday*, (*a*) *Watts* v. *Symes*, (*b*) *Taylor* v. *Popham*, (*c*) *Norton* v. *Cooper*, (*d*) and *Collard* v. *Roe*, (*e*) were referred to.]

The Lord Justice Knight Bruce. — The time during which this case has continued is, considering its nature, extraordinary. The plaintiff, a widow lady, being the owner of an empty house, and having a son a solicitor, that son entered into a negotiation with the defendant, also a solicitor, for a lease of the house, and during the course of the negotiations, or after they had ended in an agreement (I will not at present say which), the defendant was let into possession. No lease having been executed, and if there had been any written agreement, that agreement being only by correspondence, disputes arose, chiefly or solely as to repairs, by whom they were to be done. The differences went on, the defendant continuing in possession, and at last, after much correspondence, much dispute, much controversy, and much expenditure of time, this suit was instituted in May, 1862, the bill praying * thus: * 113 [His Lordship read the prayer.] The bill was afterwards amended; the defendant answered the original bill, and put in a

(*a*) 2 Phill. 227.
(*b*) 1 De G., M. & G. 240.
(*c*) 15 Ves. 72.
(*d*) 5 De G., M. & G. 728.
(*e*) 4 De G. & J. 525.

voluntary answer to the amended bill; evidence was entered into, and the suit was carried on to a hearing. The decree made at the hearing, which took place in January last, was this: [His Lordship read the decree.] From this decree the plaintiff has not appealed, nor has she sought to have the case reheard. The defendant alone has appealed, and the appeal is not of a very common description. Submitting to the decree, except as to costs, it complains only of the way in which the Master of the Rolls dealt with the costs, contending that either no costs ought to be given, or the plaintiff ought to pay costs.

On the opening of the case, the counsel for the plaintiff were asked, whether the plaintiff wished to exercise the right which we considered she had to have the decree opened? That question was answered in the affirmative, and the plaintiff's counsel expressed an election or wish on her part to have the case reargued. The case proceeded on that footing, and the Court was addressed, not parsimoniously, on that view, when after two hours the lady changed her mind, and declared her wish to retain the whole decree as it stands; but if that could not be done, and if the defendant should succeed in varying the decree as to costs, the lady still expressed her desire that the decree in all other respects should remain as it was. The argument then proceeded on that altered footing, and the only question, therefore, now is, what is to be done as to costs?

Appeals for costs alone are not common, are not impossible, and are sometimes allowed, but especially is an appeal for costs allowable when, in the opinion of the appellate Court, they have
* 114 been given in a manner inconsistent * with rule or principle; and it was well put by *Mr. Southgate*, that here they have been given in a manner against rule and principle, for that the defendant has succeeded, having resisted specific performance, and yet has been ordered to pay costs. I do not agree with that view; I think that the decree is partly in favour of one party, partly in favour of the other, and I am satisfied that the costs have not been disposed of in a way against rule or principle; and when they have not, it requires a very strong case to induce the appellant Court to depart from the view of the original Court as to costs. I acknowledge myself not entirely satisfied that, on the merits of the case, I should have arrived at the view of his Honor as to the costs; the mode of disposing of them in such an almost inconceivable case is

one on which different minds may well differ. An able and careful lawyer might come to one conclusion, another equally able and careful lawyer to another conclusion. I think that it would be wrong in such a case to depart from the view of the Court appealed from, and, therefore, not disclaiming the jurisdiction to vary the order as to the costs alone, I do not think the case one in which it is right for us to exercise it. I think that the respondent ought to take the deposit, and that there ought to be no other costs of the appeal.

THE LORD JUSTICE TURNER. — This appeal is confined to costs. Now the general rule of the Court is, that there cannot be a rehearing for costs only unless some principle is involved in the mode of dealing with them, — a rule by which, speaking for myself individually, I am much disposed to abide. It has been attempted to take this case out of the rule, upon the ground that the Court has given costs against the * defendant notwithstand- * 115 ing he has succeeded in the suit, and that this is so clearly wrong that it was unnecessary to go into the merits of the case; but this argument is not well founded, for the utmost the defendant can say is, that he has succeeded in one part of the case, and failed in the other. In order, therefore, to determine the question of costs, it would be necessary to go into the whole merits of the case. The rule is, that the Court will not do this except in extreme cases, and it is an instance of this rule, that where the parties have compromised a suit except as to costs, the Court declines to hear the case on the merits for the purpose of disposing of the costs. The rule seems to me to be founded on sound principles. If the Court ventures to dispose of the costs without entering into the merits, it might very probably dispose of them in a way inconsistent with the principle of the decree. Had the decision of this case rested with me, I should, for the sake of example, have given the respondent her costs of the appeal, and if another such appeal should come before us, I shall not consent to its being dismissed otherwise than with costs.

*116 *In the Matter of the CATHOLIC PUBLISHING AND BOOKSELLING COMPANY, LIMITED.

1864. March 3, 4, 5, 7. Before the LORDS JUSTICES.

An order for winding up a company on the application of a creditor, on the ground that the company has not paid the petitioner his debt within twenty-one days after notice requiring payment (under 25 & 26 Vict. c. 89, § 80), will not be made unless the twenty-one days have elapsed before the petition is presented.

Per the Lord Justice TURNER. Attempts to enforce, by means of a winding-up petition, the payment of a debt, the liability to which is *bonâ fide* disputed by the company, are not to be encouraged, and *semble*, in such a case the petition ought be ordered to stand over till the debt is established.

THIS was an appeal by the company from a winding-up order made by the Master of the Rolls.

The petitioners who obtained the winding-up order were stationers, and claimed a debt of 1944*l.* for paper supplied by them to the company before 1861. The paper had been supplied to a Mr. Dolman, who acted up to that year as manager of the company; and it was in dispute whether the paper had all been used for the purposes of the company, and whether the company was liable to the petitioners for any of it, the case being made, on behalf of the company, that the petitioners had supplied it to Dolman on his own credit, and that the company was liable to Dolman, and not to the petitioners, for so much of it as had been used by the company. In these circumstances the company declined to pay the sum claimed, but had paid the petitioners for all paper supplied by them after the time when Dolman ceased to be manager. The petitioners thereupon, on the 6th of July, 1863, served the company with a notice, requiring payment, as mentioned in the 25 & 26 Vict. c. 89, § 80, and presented their petition for winding up the company. This petition was presented, and answered on the 9th of July.

*117 The petition came on to be heard before the Master * of the Rolls. His Honor considered that the most convenient course would have been to order the petition to stand over till the petitioners had established their debt at law, but he thought that the Act 25 & 26 Vict. c. 42 (Mr. Rolt's Act), precluded his taking

this course. His Honor therefore entered into the question whether, upon the evidence, a debt was due from the company to the petitioners, and came to the conclusion, upon the evidence, that 1192*l.* was due. His Honor considered it not established in evidence that the company was unable to pay its debts, and he therefore thought it not a case for an immediate winding-up order; but on the 11th of February, 1864, made an order for winding up the company in case the 1192*l.* was not paid on or before the 11th of March. From this order the company appealed.

Sir H. M. Cairns, *Mr. Hobhouse*, *Mr. Bagshawe*, and *Mr. Raymond*, for the company. — This is an attempt to use the Winding-up Act as a means for enforcing payment of a disputed debt, which ought to be sued for at law, the object of the enactments as to winding up at the suit of a creditor being, to enable him to enforce an undisputed demand against an insolvent company, not to enable him to settle disputes with a company which is able to pay. The evidence does not establish that this company is unable to pay its debts; if therefore the petitioner has a debt, he can obtain a winding-up order only by bringing his case within the provisions as to non-payment for twenty-one days after demand. According to the reasonable construction of the Act, § 79, art. 4, § 80, art. 1, §§ 84, 86, the twenty-one days must have expired before the presentation of the petition, otherwise it is presented in a matter in which the Court has no jurisdiction. Where there is a *bonâ fide* dispute as to the existence of a debt, the * case ought to be left * 118 to law under sect. 86. The order of the Master of the Rolls is not, we submit, according to principle, nor warranted by the Act, for it makes the payment or non-payment of this single debt the test of the ability of the company to pay its debts.

Mr. Selwyn and *Mr. Roxburgh*, in support of the order. — Before the Act of 1856, the creditor of a company had two remedies; he might bring an action, or proceed in bankruptcy under 7 & 8 Vict. c. 111. The Joint-stock Companies' Act of 1856 took away the latter remedy, and substituted for it another. The remedy now under the Act of 1862, is an order for winding up, which is practically the same thing as a bankruptcy. Now a disputed debt may be the foundation of proceedings in bankruptcy. *Ex parte Scott*

Russell, Re Scott Russell. (*a*) The Court has jurisdiction to make such an order as has been made. *Re Rhydydefyd Colliery Company.* (*b*) The evidence establishes that a debt is owing by the company to the petitioners, and that the company is unable to pay its debts. The twenty-one days having elapsed before the petition was heard, the Court was in a position to make a winding-up order.

Mr. Hobhouse, in reply. — The principle of the Act is, that an order for winding up is to be made only when the company is unable to pay its debts, and the Act points out a particular way in which the non-payment of a single debt may become a proof of insolvency; but the petitioners must bring themselves strictly within the terms of the clause relating to non-payment after
* 119 notice, or else show by other * evidence that the company cannot pay its debts. Non-payment of a disputed debt is no evidence of insolvency. *Re Wheal Lovell Mining Company.* (*c*)

THE LORD JUSTICE KNIGHT BRUCE. — In this matter, the arguments upon which have occupied not an insufficient time, the evidence does not satisfy me that the petitioners were, when the original petition was presented, or are now, creditors of the company. Assuming that they were and are creditors, the question remains whether they have shown a case under the 79th and 80th sections of the Act of 1862 for winding up the company. This question ought, in my judgment, to be answered in the negative. The evidence does not, as I view it, establish that the company was, when the original petition was presented, or is now, unable to pay its debts, and neither the three weeks mentioned in the 80th section nor half that time from the notice given by the petitioners to pay the debt alleged to be due to them had elapsed, when the original petition was presented. I am of opinion, that the order for winding up ought to be discharged, without prejudice to the question whether the petitioners are creditors of the company, and that the petition ought to be dismissed.

THE LORD JUSTICE TURNER. — My opinion also is that, upon the facts as they now stand before us, this petition ought to be dis-

(*a*) 6 Law T. (N. S.) 138. (*b*) 3 De G. & J. 80. (*c*) 1 Mac. & G. 1.

missed. Two points are raised: first, whether the petitioners at the Rolls were and are creditors of the company; and, secondly, whether at the time when the petition was presented
* the company was in such a position as to make a winding- * 120
up order proper. On the first of these points I do not think it necessary to give, and, as it may become the subject of proceedings in another Court, I do not mean to give, any opinion, for, assuming the petitioners to be creditors of the company, I am of opinion that their case fails upon the second point. It was urged that the company ought to be wound up on two grounds: first, that payment of the petitioners' debt had been demanded in writing in manner provided by the 25 & 26 Vict. c. 89, § 80, and that the company had for three weeks after service of the demand neglected to pay or compound for or secure the debt; and, secondly, that the company is shown to be unable to pay its debts.

As to the first of these points, the notice for payment of the alleged debt was served on the 6th of July, and the petition for winding up the company was presented on the 9th. It was contended on behalf of the respondents, that if the twenty-one days from the time of the service of the notice for payment elapsed without payment being made, the case was within the Act, although that period did not expire till after the presenting the petition. I am of opinion that this is not the true construction of the Act. The 80th section refers to the 4th clause of the 79th section, and authority is given to order a company to be wound up in case of non-payment of a debt for twenty-one days after demand, on the ground that such default in payment is conclusive evidence that the company is unable to pay its debts. The ground of the jurisdiction to make the order is that the company is unable to pay its debts. Now, in order to give the Court jurisdiction to make the order, it must, I think, be shown that the inability to pay debts existed at the time when the petition was presented. It would, therefore, as it appears to me, be an * unwarrantable * 121
construction of the Act to hold that the twenty-one days can run after the presenting a petition.

[His Lordship then briefly reviewed the evidence, and stated his reasons for considering that the company was not shown to be unable to pay its debts.]

I think that applications of this kind by creditors whose debts are *bonâ fide* disputed are not to be encouraged. I do not say that the legislature has not given the Court power to decide upon a winding-up petition the question whether a debt which the company disputes is owing or not, but I think that such an application is a most inconvenient mode of trying that question; and where there is a *bonâ fide* dispute as to the existence of the debt, and the case turns upon the question whether there is a debt, I think the Court would do well to exercise the power given it by the 86th section of the Act, to adjourn the petition till the existence of the debt is established. Here, however, I think that the petitioners, assuming them to be creditors, have not brought the case within the Act, and that the petition, therefore, ought to be dismissed.

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* 122 * In the Matter of METCALFE'S TRUSTS;
AND
In the Matter of The ACT FOR THE RELIEF OF TRUSTEES.

1864. March 7. Before the LORDS JUSTICES.

A professed nun, who had taken the vows of poverty and obedience, and had executed a deed assigning all her property to trustees for the benefit of a Roman Catholic ecclesiastical institution, presented a petition, asking for the transfer to the trustees of that deed of a fund in Court to which she was entitled: *Held*, that her being a professed nun did not affect her capacity to take or dispose of property, and that whether the deed was or was not liable to be impeached on the ground of her being, when she executed it, so circumstanced as to be unable to exercise her own free will, the Court could not refuse to order a transfer of the fund to the trustees upon her application.[1]

THIS was an appeal from an order of the Master of the Rolls, who declined to direct payment out of Court of a fund to the petitioner, Miss Thompson, or her nominees, on the ground of her being a professed nun.

Miss Thompson became a Roman Catholic in 1858; and in the same year left England and entered a Carmelite convent in Paris.

[1] See Evans *v.* Cassidy, 11 Irish Eq. 243; Blake *v.* Blake, 4 Irish Eq. 349.

In 1861, she took the black veil, and took the usual vows of poverty, obedience, and chastity. By a deed executed in June, 1862, she conveyed and assigned all her real and personal estate to Mr. Hope Scott and Serjeant Bellasis upon trusts for the benefit of the oratory of St. Philip Neri at Brompton; and covenanted to do all necessary acts for vesting any future property she might acquire in the same trustees, and for the same purposes.

Shortly after the execution of this deed, Miss Thompson became entitled under the will of Jacob Metcalfe to a share of his residuary estate. The trustees of the will, having received notice of the deed of June, 1862, paid Miss Thompson's share into Court, under the Act for the Relief of Trustees. Miss Thompson presented her petition, asking that the fund might be paid to Mr. Hope Scott and Serjeant Bellasis, to be held upon the trusts of the deed of June, 1862. The trustees and some of the * other residuary legatees opposed the petition, contending * 123 that the petitioner, being a professed nun, was civilly dead and incapable of taking property; and, if not, that still the fund ought not to be dealt with as proposed, the petitioner not being a free agent. The Master of the Rolls held that the objection as to civil death was without foundation, but that the Court ought not to part with the fund without satisfactory proof that the mode of dealing with it was sanctioned and desired by the petitioner, and that she was under no moral duress in the matter. His Honor accordingly directed the dividends to be invested and accumulated, with liberty to apply.

Miss Thompson appealed from this order.

Mr. Selwyn and *Mr. Bendon*, in support of the appeal. — It is clear that, in the existing state of things, a nun cannot be treated as civilly dead; and so the Master of the Rolls thought. Roman Catholics are now dissenters and nothing more, and the law does not recognize profession. The deed of June, 1862, was not made for the benefit of the foreign convent in which the petitioner is, but of an English institution, so that there is no reason to suspect duress. But it is immaterial whether the deed is valid or not; the petitioner has lost none of her rights as to property by becoming a nun; she is of age and of sound mind, and there is no tenable ground on which the Court can refuse, at her request, to

transfer the fund to her or to any nominee of hers. In *Fulham* v. *Macarthy*, (*a*) on which the Master of the Rolls relied, the bill was dismissed on the ground of misjoinder, because there might be question whether the deed was valid, which could not be tried between co-plaintiffs. Here, the petitioner comes alone
* 124 affirming * the deed, so that the decision in *Fulham* v. *Macarthy* has no application.

Mr. Baggallay and *Mr. Bowring*, for the trustees and some of the other residuary legatees. — The Master of the Rolls thought it clear that the doctrine of civil death is done away with; but we submit that the authorities do not support this view. In *Fulham* v. *Macarthy*, (*b*) the Lord Chancellor of Ireland expressed an opinion that the doctrine was still subsisting. The House of Lords, on appeal, (*a*) disposed of the case solely on a point of pleading, but did not express any opinion adverse to that of the Lord Chancellor. There are strong authorities that, even since the Reformation, a professed nun cannot take property. Co. Litt., (*c*) Shepp. Touch., (*d*) Swinb. Wills, (*e*) *Thornby* v. *Fleetwood*. (*g*)

[The Lord Justice Knight Bruce. — Has it not always been held that profession in a foreign country did not cause civil death ?]

Yes; but that was only because the evidence of profession was a certificate from the bishop of the diocese; no evidence is required here, when the lady comes telling the Court that she is a professed nun. In *Anderson* v. *Commissioners of Forfeited Estates*, (*h*) the difficulty was got over by the confession of the party; a monk at Douai, having confessed himself a monk, was treated as civilly dead. There is not a single case showing that the law is changed. It was argued at the Rolls, that since the Reformation a nun has no *status* recognized by the law; but
* 125 the case of *Rex* v. *Lady Portington* (*i*) does not * show

(*a*) 1 H. L. Cas. 703.
(*b*) 12 Jur. 757; 9 Ir. Eq. Rep. 620.
(*c*) Page 132 *a*.
(*d*) Page 305, 435.
(*e*) Page 193.
(*g*) 1 Stra. 323, 339, 347, 351, 370, 372, 374.
(*h*) 9 Mod. 54.
(*i*) 1 Salk. 162.

this, and the cases referred to in Com. Dig. (*a*) show that the *status* has been recognized since the Reformation.

But supposing the lady capable of taking property, was she capable of making a valid disposition of it? She has taken vows of poverty and obedience, which place her mind completely under the control of her ecclesiastical superiors. She has no more free-will about the disposition of her property than a prisoner among banditti, who is making arrangements for his ransom; the only difference being, that in one case the terrors are spiritual, and in the other material. The case is governed in principle by *Huguenin* v. *Baseley*. (*b*) A nun cannot have independent professional assistance; she is, in fact, in prison.

Mr. Selwyn, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — Miss Thompson, the petitioner, and the two gentlemen, Mr. Hope Scott and Mr. Serjeant Bellasis, in whose favour she executed a certain deed, all appear before us on the present occasion, and all consent that the lady's property in question shall be transferred either to her or to them. That being the case, it is of little consequence whether the transfer is made to her or to them. As regards the contest on the ground of this lady's profession and civil death, I am of opinion that, even without regard to the fact of the profession being a foreign profession, the argument is mere nonsense, and so the Master of the Rolls appears to have thought. Thus far I agree with him; but I respectfully dissent * from his view as to the * 126 alleged undue influence. It may be that the lady, in executing this deed, was subject to an influence of which we cannot think highly; it may be that the deed ought to be disregarded; but to say that a lady, in the full possession of her faculties, is not to deal with her property because she is under the influence of those who may induce her to deal with it in a way which we should consider unwise, would be attributing to the Courts of England a power which I do not think that they possess. This lady may be about to deal with her property in a way which we should think unadvisable, but we have no jurisdiction to take that into consideration. She comes here asking for her own property, and we

(*a*) Tit. "Capacity," D. 1. (*b*) 14 Ves. 273.

have no power to refuse the application. As the lady and her two trustees all appear and concur in asking for a transfer of the fund, either to the lady herself or to the trustees, it is of no consequence whether the transfer is directed to be made to her or to them, but it must be expressed in the order that they all concur in asking for a transfer in the form in which it is directed.

The Master of the Rolls has not disposed of the costs, and has not directed the costs, deducted by the trustees of the will on paying the fund into Court, to be refunded. The present petition does not ask that they may be refunded; but as there was, in my judgment, no sufficient reason for bringing the fund into Court, I think that there ought not to be any order for giving the trustees any costs.

THE LORD JUSTICE TURNER. — I agree, and for the same reasons.

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* 127 * FORD *v.* TYNTE.

1864. February 11, 12, 13. March 10. Before the LORDS JUSTICES.

The report of an expert under 15 & 16 Vict. c. 80, § 42, is not to be looked at in the light of an award, but only as furnishing materials for the information and guidance of the Court.[1]

What a prudent owner would do in the proper course of management is no measure of what a tenant for life without impeachment of waste may do as to cutting timber planted or left standing for ornament.

Halliwell v. *Phillips*, 4 Jur. (N. S.) 607, observed upon.

Form of inquiry as to cutting ornamental timber.

THIS was a motion by way of appeal from an order of Vice-Chancellor WOOD, authorizing the receiver in the cause to cut certain timber which was alleged by the appellants to be ornamental.

The Hallswell estate, on which the timber in question stood, was devised in strict settlement by the will of a testator who died in 1785. It had been resettled more than once, and was now subject to the limitations of a settlement dated the 10th of April,

[1] See Jones *v.* Stevens, 5 Met. 373; Heywood *v.* Miner, 102 Mass. 466; Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80.

1841, under which Colonel Tynte was tenant for life in possession without impeachment of waste. From 1785 to the present time no person had ever been entitled to an estate of inheritance in possession. Colonel Tynte having heavily incumbered his life-estate, this suit was instituted by one of the incumbrancers for the purpose of enforcing his security, and a receiver was appointed.

An application was made to Vice-Chancellor WOOD, to whose Court the cause was attached, that the receiver might be at liberty to cut down and sell a large number of trees upon parts of that estate called Long Thicket, Chick's Thicket, and Ford Coppice and certain other parts of the estate, including six elm-trees and one oak on Lovedere Farm, and some oaks and elms on West Bower Farm. The Long Thicket was a long narrow wood forming a belt to the park, but extending also to a considerable distance beyond the park. The application was resisted on the ground that much of the timber proposed to be cut was entitled to protection as ornamental * timber. The Vice-Chancellor, finding it * 128 difficult upon the conflicting evidence before him, to arrive at a satisfactory conclusion as to what trees could properly be cut, thought it desirable to obtain the opinion of some independent person upon the subject, and accordingly referred the question to Mr. Paxton, a land-surveyor of eminence.

The instructions given by his Honor to Mr. Paxton as to the Long Thicket were, to inquire and report whether any trees marked to be cut in that thicket could be cut in such a manner as would be done by any prudent owner in the proper management of that wood as a belt to the park; and, as to the other trees, the instructions were also in terms involving the question, whether they were such trees as would not be cut by a prudent owner in the ordinary course of management.

Mr. Paxton, by his report under this reference, certified as to the trees in the Long Thicket (with the exception of some which he mentioned to be unripe for felling), that they might be cut with propriety, as their removal would ultimately prove advantageous to the growth of the large number of young trees that would be left standing, as also to the evergreens and shrubs planted there, but which at present were prevented from thriving by the mass of foliage overhanging them. That he had viewed the thicket from various parts of the estate, and from those parts of the mansion where a view could be obtained, and that he was of

opinion that the cutting and removal of the timber marked, with the exception of the unripe trees, would not despoil the wood of its ornamental character, nor in any way tend to injure the estate. And, as to the other trees, he certified which of them he considered to be unripe; and added that he was of opinion
* 129 that these trees, except those which were * unripe, might with prudence be removed without detriment to the ornamental nature of the estate, and were such as could be cut by an owner having due regard to the proper management of the estate.

The Vice-Chancellor, after receiving this report, made an order authorizing the receiver to cut a large number of trees specified in one of the affidavits before him, except such of them as were stated by Mr. Paxton to be unripe.

Mr. Giffard and *Mr. Kingdon*, for the appellants. — The case we make is, that much of this timber is ornamental according to the sense of that term as used by the Court, and that the directions which have been given for ascertaining what parts of the timber proposed to be cut ought to be cut, are not in such a form as to lead to a correct result. We say that if a group of trees is planted or left standing for ornament or shelter, none of the trees can be felled by a tenant for life except those the felling of which will improve others of them. *Bewick* v. *Whitfield*, (*a*) *Marquis of Downshire* v. *Lady Sandys*, (*b*) *Marker* v. *Marker*, (*c*) *Lushington* v. *Boldero*. (*d*) The last case gives the proper form of inquiry. The reference to Mr. Paxton in the present case proceeds on the footing of what a prudent owner in fee would do; but that furnishes no standard of what a tenant for life will be allowed by the Court to do.

Mr. Southgate and *Mr. Renshaw*, for the plaintiff, in support of the order appealed from. — The appellants have taken the chance of Paxton's deciding in their favour, and until he decided
* 130 against * them they made no objection to the directions given to him. He stood, we submit, in the position of an arbitrator, and the Court will not admit evidence to show that he came to a wrong conclusion. The directions given him were

(*a*) 3 P. Wms. 267.
(*b*) 6 Ves. 107, 111.
(*c*) 9 Hare, 1.
(*d*) 6 Mad. 149.

correct. *Wombwell* v. *Belasyse*, (*a*) *Burges* v. *Lamb*, (*b*) *Marker* v. *Marker*, (*c*) *Halliwell* v. *Phillips*, (*d*) 15 & 16 Vict. c. 80, § 42. And upon the evidence Paxton came to a right conclusion. There is not satisfactory evidence that any of the trees in question were planted or left standing for ornament; as regards shelter, what is proposed to be done will not interfere with it; and, assuming the belt to have been planted for ornament, its ornamental character as a whole will not be injured.

Mr. Giffard, in reply. — Those trees only ought to be cut, the removal of which will be beneficial to other ornamental trees, and the reference ought to have been in such terms as to secure this. The Vice-Chancellor cannot have intended to lay down the general rule attributed to him in the report of *Halliwell* v. *Phillips*, for it is opposed to the stream of authorities. *Marker* v. *Marker* turned on the terms of a special power. The general proposition laid down by Lord ELDON in *Marquis of Downshire* v. *Lady Sandys* embraces the present case. The ornamental timber is a portion of the inheritance.

Judgment reserved.

March 10.

The Lord Justice TURNER, after stating the facts, proceeded as follows: —

It was argued, on the part of the respondents to this motion, that this report ought to be deemed to be conclusive,

* and that some affidavits, which have been filed upon this * 131 appeal on the part of the appellants in opposition to it, ought not to be received; but, in my opinion, reports of this nature, although entitled to great weight as affording independent testimony, cannot be considered as awards, or in any other light than as furnishing materials for the information and guidance of the Court. I think, therefore, that affidavits in opposition to them may well be received; but however this may be in an ordinary case, I think that in this case justice requires that all the affidavits, as well before as since the report of Mr. Paxton, should be looked

(*a*) 6 Ves. 110, *n.*
(*b*) 16 Ves. 174, 185.
(*c*) 9 Hare, 1–6.
(*d*) 4 Jur. (N. S.) 607, V. C. W.

at before we come to any determination upon the question before us, for, with all respect to the Vice-Chancellor, I do not think that the real question at issue in this case was sufficiently indicated in the instructions given to Mr. Paxton. According to the law of the Court, as I understand it, the question, what a prudent owner would do in the proper or ordinary course of management, can be no measure of the obligation which attaches in this Court upon a tenant for life without impeachment of waste, with reference to timber planted or left standing for ornament; for every such tenant for life is bound by the taste or want of taste of any absolute owner by whom the timber may have been so planted or left standing; and so far as the case of *Halliwell* v. *Phillips* (*a*) contravenes this opinion, I venture respectfully to dissent from it. I doubt also whether the instructions to Mr. Paxton were not too limited in directing his attention to the Long Thicket only as a belt to the park, for the thicket seems to extend much beyond the park, and I think it may well be considered to have been planted or left standing for ornament, no less than for shelter. If it be said that, these instructions having been given with reference to tim-
* 132 ber * planted or left standing for ornament, what is said in them as to a prudent owner must be understood as having had reference to a prudent owner of timber of that description, it is, I think, a sufficient answer, that if this was intended it should have been distinctly pointed out, and that Mr. Paxton should have been told that a tenant for life without impeachment of waste is not ordinarily, at least for any beneficial purpose, the owner of such timber, but is bound to preserve it; and although I observe that Mr. Paxton in one of his affidavits states that, when speaking in his report of ornamental timber, he meant timber planted or left standing for ornament, I cannot doubt, from the tenor of his report, that, in some degree at least, he looked at the timber in question as ornamental in the natural sense of that word, and not merely in the sense in which the word is understood by this Court. Upon the whole, therefore, I do not think we can safely hold the appellants to be bound by Mr. Paxton's report, nor can I agree in the order made by the Vice-Chancellor following upon that report.

Laying out of consideration Mr. Paxton's report, there are two questions to be considered: first, whether the timber in question

(*a*) 4 Jur. (N. S.) 607.

ought to be deemed to have been planted or left standing for ornament; and secondly, whether, assuming it to have been so, the receiver is entitled to cut any, and, if any, what part of it. Each of these questions must, I think, be made the subject of further inquiry, for I agree with the Vice-Chancellor, that the evidence is in a very unsatisfactory state, even as to the first question, and we have understood from the bar that further evidence may be forthcoming upon it; and as to the second question, more pointed inquiries than have yet been made seem to me to be necessary.

The form of the inquiry to be directed on the first * question does not seem to me to be open to any sub- * 133 stantial difficulty, as its object must be simply to ascertain whether the woods and trees in question were planted or left standing for ornament or shelter; but there is much difficulty as to the form of the inquiry which ought to be directed with reference to the second question. It was contended on the part of the appellants, that this inquiry ought to be strictly in the form adopted in *Lushington* v. *Boldero*, upon the hearing on further directions. The respondents, on the other hand, although they did not point out any particular form of inquiry, contended that the inquiry ought not to be so limited, and they referred to *Wombwell* v. *Belasyse*. There is not, so far as I can find, any settled form of inquiry applicable to all cases of this description, nor do I think that there can be; for the question to what extent ornamental timber may be cut, must, as I apprehend, depend upon the circumstances of each particular case, and the proper inquiry to be directed must vary accordingly. For instance, in *Wombwell* v. *Belasyse*, I observe that Lord ELDON, in almost every passage of his judgment bearing upon the form of the inquiry, refers to a wood resorted to by the owner for the supply of timber for repairs, and in one passage, at least, he says for sale also. It is only reasonable, therefore, to suppose that the case which he had before him was that of a wood which had been so resorted to, and this would go far to explain the second issue directed by him, as in that case the wood might well be taken to have been dedicated to the purpose of ornament or shelter, subject to its being used in the first place for the purpose of repairs, or even of sale; but, in the present case, the evidence failing, as it seems to me to do, to show that the timber in these woods was cut by any absolute owner for repairs or for sale, it would be difficult, I think, to say that the woods, if at all dedi-

* 134 cated to the purpose of ornament or shelter, * were not absolutely and entirely so dedicated. I make these observations with reference to the case of *Halliwell* v. *Phillips*, as I am not altogether satisfied that *Wombwell* v. *Belasyse* has not, in that case, been carried further than it was intended to go. Upon the whole, I think, subject to any observations which may be made by counsel, the further order to be made upon this motion should be as follows: —

That an inquiry be made whether the woods called Long Thicket, Chicke's Thicket, and Ford's Coppice, or any or either and which of them, and the six elm-trees and one oak-tree on Lovedere Farm, and the oak-trees and elm-trees in the pasture-land on West Bower Farm, which have been marked for cutting, or any or either and which of such trees, were or was or have or has been planted or left standing by any owner in fee or in tail of the Hallswell estate, or any part thereof, for the ornament or shelter of the mansion-house on the said estate, or of the gardens, park, or pleasure-grounds thereto belonging, or of any road or roads, drive or drives, path or paths leading thereto, or for the purpose of intercepting the view of any object or objects intended to be kept out of sight from the said mansion-house, gardens, park, or pleasure-grounds, or any part thereof; and in case it shall be so found as to the said woods or any or either of them, then let further inquiry be made whether the trees therein have, ordinarily or otherwise and under what circumstances, been cut for repairs or for sale, and what estate or interest the person or persons by whom or by whose order or direction the same were so cut had in the said Hallswell estate at the time of the cutting thereof, and whether the trees in the said woods and the said other trees which have been marked for cutting, or any or either and which of such trees, injure or impede the growth of any other trees adjoining or near thereto which are of so much importance to the purposes of

* 135 * ornament or shelter to the said mansion-house, gardens, park, or pleasure-grounds as that the removal of the trees so marked for cutting is essential to such purposes of ornament or shelter.

The Lord Justice Knight Bruce. — I am of the same opinion.

GOODRICKE *v.* TAYLOR.

1864. February 1, 24. March 10. Before the LORDS JUSTICES.

A tradesman mortgaged the freehold house in which he carried on his trade, being his only real estate, to secure an existing debt of 1100*l.* for which he was liable as surety, which exceeded the value of the mortgaged property. His other property was of very trifling amount. He was at the time liable as surety on a promissory note for 2000*l.*, and afterwards the other makers having become insolvent, he was called upon for payment, and became bankrupt: *Held*, that the mortgage was void as against the assignees in bankruptcy, as being an assignment made to defeat or delay creditors.[1]

***Per* the Lord Justice TURNER. A surety is no more justified in placing the whole of his property out of the reach of liability to pay the debt, than if he were the principal debtor.**

THIS was an appeal from a decree of Vice-Chancellor WOOD setting aside a mortgage as being void against the assignees in bankruptcy of the mortgagor.

The bankrupt Thomas Wilson was a saddler in a small way of business in a country town. In May, 1860, Perry and Wilson, who were timber merchants, Wilson being the son of Thomas Wilson, were in want of money; and on the 1st of June, obtained an advance of 2000*l.* from Sir F. Goodricke, a banker, on the security of a joint and several promissory note of the two partners and of John Perry, the father of one of them, and Thomas Wilson. This note was renewed in September, 1860, in December, 1860, and in March, 1861.

The mortgage to which this suit related was made on * the 6th of May, 1861, to John Wilson and Richard Tay- * 136 lor for 1100*l.* This sum of 1100*l.* was made up as follows: In December, 1858, John Wilson had advanced to the two timber-merchants 400*l.*, on the joint and several promissory note of themselves and John Perry, and Thomas Wilson had afterwards added his name to the note as maker, by way of further securing this debt. This 400*l.* was part of the 1100*l.*; 650*l.*, further part of

[1] See Allen *v.* Bonnett, L. R. 5 Ch. Ap. 577; *Re* Waite, 1 Lowell, 207, 208, 209, *per* LOWELL J.; Kerr F. & M. (1st Am. ed.) 282 *et seq.*; Alton *v.* Harrison, L. R. 4 Ch. Ap. 622; Morse *v.* Godfrey, 3 Story, 364; Peckham *v.* Burrows, 3 Story, 544; *Ex parte* Birmingham Banking Co., L. R. 6 Ch. Ap. 83.

it, was an old debt from the timber-merchants for timber, for which Taylor held a joint and several promissory note of themselves and John Perry and Thomas Wilson, which became due on the 26th of April, 1861. The remaining 50*l.* was made up by a trade debt of 41*l.* due from Thomas Wilson to John Wilson, and 9*l.* interest on the larger sums. The mortgage comprised a small real estate consisting of the house in which the bankrupt resided and carried on his business and about two acres of land, and was framed by way of trust for sale, to be carried into effect in case of non-payment for seven days after demand.

At the time of this transaction, Thomas Wilson's property consisted of the mortgaged estate, which appeared to be worth less than 1000*l.*, and of book debts to the amount of about 103*l.*, stock-in-trade worth about 10*l.*, and furniture worth about 20*l.* He owed trade debts to the amount of about 57*l.* It appeared from the accounts in the bankruptcy, that he did not usually have a stock-in-trade amounting to much more than 10*l.*

Perry and Wilson, the timber-merchants, shortly afterwards became bankrupt; and John Perry, the co-surety for the 2000*l.*, being insolvent, Thomas Wilson was applied to for the 2000*l.*, and, after an ineffectual attempt to make an arrangement with his creditors, was made bankrupt on the 6th of July, 1861.

*137 *The assignees having filed their bill to set aside the mortgage, a decree to that effect was made by Vice-Chancellor Wood. The representatives of John Wilson appealed.

Sir H. M. Cairns and *Mr. Karslake*, for the plaintiffs, in support of the decree. — When the bankrupt gave a mortgage for 1100*l.* with immediate power of sale, he made an assignment of his solvency. Even if he did it under pressure, that will make no difference; pressure will justify the preferring one creditor to another,[1] but not the making over the debtor's whole property to one creditor. *Ex parte Bailey*, (*a*) and *Ex parte Bland*, (*b*) govern this case. That the mortgage comprised no trade property, and that it did not tend to defeat or delay trade creditors does not protect it. *Smith* v. *Cannan*, (*c*) *Porter* v. *Walker*. (*d*)

(*a*) 3 De G., M. & G. 534.
(*b*) 6 De G., M. & G. 757.
(*c*) 2 E. & B. 35.
(*d*) 1 Man. & G. 686.

[1] See Jones *v.* Harker, L. R. 6 Q. B. 77; *Ex parte* Birmingham Banking Co., L. R. 12 Eq. 83.

In *Lindon* v. *Sharp* (*a*) there was pressure, but that did not save the transaction. Here, there could not be pressure: the bankrupt was not liable on the 400*l.* note; and as to the 650*l.* note, it had been renewed, so that there was no present right of action when the mortgage was given. Actual intention to defeat creditors is not requisite; the intention will be imputed if that is the necessary or probable consequence of the act. *Stewart* v. *Moody*, (*b*) *Stanger* v. *Wilkins*, (*c*) *Johnson* v. *Fesemeyer*. (*d*) The cases are collected in Smith's Lead. Cas. (*e*) It will be urged that the bankrupt believed he should never be called upon to pay the 2000*l.*; but, as the Vice-Chancellor said, he had no right to act on any such belief.

* *Mr. Rolt* and *Mr. G. N. Colt*, for the appellants.—The * 138 plaintiffs treat the mortgage as an assignment of all the bankrupt's property, with only a colourable exception; but that exception is of all his trade assets, and if the mortgagees had taken possession, the business might have gone on all the same. The case is not like that of a business which depends on a large stock-in-trade. As to the power of taking possession and selling after seven days' notice, the bankrupt might possibly have complained; but such a power does not hurt his creditors. The cases do not support the proposition, that a trader cannot give an effectual security for the debt of another person to an amount which, if he is called upon to pay it, will make him insolvent. *Hooper* v. *Smith* (*g*) does not go any thing like that length; nor do *Ex parte Bland*, (*h*) *Lindon* v. *Sharp*, (*a*) and *Ex parte Bailey*, (*i*) support the proposition. If there is property left with which the trade can be carried on, an assignment is not an act of bankruptcy. *Carr* v. *Burdiss*, (*k*) *Abbott* v. *Burbage*, (*l*) *Hale* v. *Allnutt*. (*m*) Surely a mortgage by a merchant of a house in the City would not be void because it contained his counting-house, his ships and goods not being included in the mortgage. This mortgage was not the voluntary act of the bankrupt, and cannot be deemed fraudulent. *Young* v. *Waud*. (*n*)

(*a*) 6 Man. & G. 895.
(*b*) 1 Cr., M. & R. 777.
(*c*) 19 Beav. 626.
(*d*) 25 Beav. 88; 3 De G. & J. 13.
(*e*) Vol. 1, p. 19.
(*g*) 1 W. Bl. 441.
(*h*) 6 De G., M. & G. 757.
(*i*) 3 De G., M. & G. 534.
(*k*) 1 Cr., M. & R. 443.
(*l*) 2 Scott, 656, 660.
(*m*) 18 C. B. 505.
(*n*) 8 Exch. 221.

Mr. Karslake, in reply. — This is a deed, the necessary effect of which is to delay creditors, for it left nothing to pay Sir F. Goodricke's debt. That the stock-in-trade is not assigned, * 139 is * not material. Some of the cases contain language which appears to attach undue importance to that circumstance; but they are explained in *Smith* v. *Cannan*. (*a*) In *Porter* v. *Walker*, (*b*) no stock-in-trade was included in the assignment, yet it was held an act of bankruptcy. The question is whether the assignment includes so large an amount of the assignor's property as to "break him up."

Judgment reserved.

March 10.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, at the time of the impeached transaction (the disputed mortgage), the bankrupt was deeply insolvent, that is, his entire property was not sufficient to pay ten shillings in the pound on his debts, and this whether we look on the impeached transaction as valid or invalid. Its validity of course would increase largely the loss to the plaintiff Sir F. Goodricke, as the principal creditor. The mortgage thus impeached was in an unusual form, enabling the mortgaged property to be sold at the end of seven days' notice. The property so mortgaged and made salable, which was the chief and most valuable part of what the bankrupt had, was the whole of his real estate. His trade was carried on there, and his continuance in trade without it must, I conceive, have been substantially impossible, so that, in effect, I think the mortgage made the continuance of his existence in trade a matter dependent on the will and pleasure of the mortgagees. My opinion is, that all the facts of the case show the mortgage to have been with the intent to delay and defeat creditors, and holding accordingly with the Vice-Chancellor, that it was an act of bankruptcy, I agree in the decree.

* 140 * THE LORD JUSTICE TURNER. — This is a bill filed by the assignees under the bankruptcy of T. Wilson, for the purpose of setting aside a mortgage made by the bankrupt to John

(*a*) 2 E. & B. 35. (*b*) 1 Man. & G. 686.

Wilson and Richard Taylor for securing the sum of 1100*l.* The bankrupt was a trader, carrying on a small saddlery business in a country town, producing him about 70*l.* a year. At the date of the mortgage his whole property consisted of the house in which he lived and carried on his trade, and about two acres of land, the whole not exceeding 1000*l.* in value, of book-debts due to him to the amount of about 103*l.*, of stock-in-trade of the value of about 10*l.*, and of furniture of the value of about 20*l.*, and he was then indebted in the above amount to the mortgagees on promissory notes, in which he had joined as surety. A question indeed is raised by the bill whether, as to one of these notes, he was in any way liable upon it; but the most favourable view for the mortgagees seems to me to be to assume that he was so liable, for if he was not, the absence of liability might of itself furnish ground for impeaching the mortgage. I assume, therefore, that he was liable on the note in question. The bankrupt was also, at the date of the mortgage, liable to the plaintiff Sir F. Goodricke, now one of the assignees, on a promissory note for 2000*l.*, in which he had also joined as surety, and, in addition to this liability, he then owed some small trade debts to the amount of about 57*l.* The mortgage in question bears date the 6th of May, 1861, and was made by way of trust for sale in default of payment within seven days after demand. The bankruptcy was on the 6th of July, 1861. The principal debtors in all the above-mentioned promissory notes have also become bankrupt, and the co-surety in them is insolvent. Under these circumstances, the Vice-Chancellor * Sir WILLIAM PAGE WOOD has set aside the mort- * 141 gage. The mortgagees have appealed.

Upon considering the facts of the case, and looking into the authorities on the subject, I entertain no doubt that his Honor's decrée is perfectly right. The mortgage in question cannot, I think, be regarded otherwise than as extending for all practical purposes to the entire property of the bankrupt. Upon its being put in force, not only would there be nothing left with which the trade could be carried on, but the bankrupt would be reduced to a state of utter and hopeless insolvency. Not only would the house in which the bankrupt lived and carried on his trade be taken away, but the trade could not be carried on otherwise than by the mercy of the creditors, as there would be a large amount of debt left unpaid. This is a sufficient answer to the argument which

was urged on the part of the appellants, that, from the limited extent of the trade, it might well be carried on at some other place after the house was sold.

Reliance was also placed, on the part of the appellants, upon the bankrupt being a surety only in the promissory notes, and evidence was referred to as showing that he had reason to expect that he would not be called upon for payment of the notes; but every surety must be taken to contemplate that he may be called upon to pay the debts for which he is surety, and he can no more be justified in placing the whole of his property out of the reach of liability to pay them than if he was principal debtor, — as in truth this bankrupt was, as between him and the creditors, on the notes. Possibly, in some cases, in which the question of intent may be doubtful, the fact of the debtor being a surety only may be material; but I do not well see how it can be so,
* 142 * where the whole property is assigned, and the law imputes the intent as a necessary consequence of the Act. Upon the whole I think that the case is clear, and that the appeal must be dismissed with costs.

MIDDLETON *v.* GREENWOOD.

1864. January 28, 29. March 16. Before the Lords Justices.

The defendant agreed to grant the plaintiff a lease of a public-house, and to make and form therein a spirit vault, and put in plate-glass windows and do every thing therewith necessary at his own expense, and paint new the outside of all the woodwork, as well as put the slates, chimney pots, and roofing in thorough repair. A decree directing specific performance of the agreement to grant the lease, and directing an inquiry as to damages for the non-performance of the agreement with respect to the vault, windows, painting and repairs, was affirmed on appeal.[1]

This was an appeal by the defendant from a decree of Vice-Chancellor Wood ordering specific performance of an agreement by him to grant a lease to the plaintiff, and an inquiry as to damages for the non-performance by the defendant of work agreed to be done by him on the premises.

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1080, and cases in note (8), 1081, 1082; 1 Sugden V. & P. (8th Am. ed.) 233, 234, and notes.

The agreement was dated the 26th of May, 1862, and thereby the defendant agreed to let and the plaintiff to take at the yearly rent of 100*l*., payable half-yearly on the 1st of January and the 1st of July, for ten years, from the 1st of July then next, a public-house called the Britannia Inn, "the taker to pay all rates, taxes, and licenses, and all other out-payments, except property and income tax, and keep and leave the premises in good and tenantable repair; the lettor to make certain alterations now suggested, *and to make and form a spirit vault, and put in plate-glass windows, and do every thing therewith necessary at his own expense, and paint new the outside of all the wood-work, as well as put the slates, chimney pots and roofing in thorough repair.*" The rest of the agreement is not material for the purpose of the present report.

Disputes having arisen, the plaintiff filed his bill for * specific performance, waiving specific performance so far * 143 as regarded any of the alterations, except those which are printed in italics, and praying "that either in addition to or in substitution for specific performance of the said agreement, so far as the same is not hereby waived, or of such part thereof as this Honourable Court shall think fit to direct, the defendant may be decreed to pay to the plaintiff such damages as this Honourable Court may think fit to award by reason of the non-performance by the defendant of his said agreement otherwise than in the particulars the performance of which is hereby waived, such damages to be assessed as this Honourable Court shall direct."

Vice-Chancellor WOOD on the 23d of November, 1863, made a decree declaring that the plaintiff was entitled to have the agreement for a lease specifically performed and carried into effect, and decreeing the same accordingly. It was ordered that a proper lease should be settled in Chambers, and be executed by the defendant, and that the plaintiff should execute a counterpart, and "that an inquiry be made under what circumstances the delivery of possession of the said hereditaments and premises to the plaintiff was delayed after the 1st day of July, 1862, the time mentioned in the said agreement for such delivery, and what damages ought to be paid to the plaintiff in respect of the non-performance of the said agreement, either as regards the non-delivery of possession of the said premises on the 1st day of July, 1862, or in respect of making and forming a spirit vault and putting in plate-glass windows, and

doing every thing therewith necessary, and painting the outside of all the wood-work, as well as putting the slates, chimney-pots and roofing in thorough repair, if the same shall not be done by the defendant." The defendant was ordered to pay the plaintiff
* 144 his costs * up to the hearing, and further consideration and subsequent costs were reserved.

The defendant appealed from the whole decree. Various grounds of defence had been set up by him, depending on matters as to which there was a considerable conflict of evidence; but the only point on which it has been thought desirable to report the case is, the question arising as to the repairs and alterations which the defendant had agreed to perform.

Mr. Rolt and *Mr. Freeling*, for the plaintiff, in support of the decree, referred to *Soames* v. *Edge* (*a*) and *Norris* v. *Jackson*. (*b*)

Mr. Daniel and *Mr. Little*, for the defendant. — This is an agreement of which the Court cannot perform the whole, having no jurisdiction to decree the making the vault, putting in plate-glass windows and doing repairs; the bill ought therefore to be dismissed. *Taylor* v. *Portington*, (*c*) *Brace* v. *Wehnert*. (*d*) The decree proceeds on a new principle quite foreign to the rules of a Court of Equity, to decree specific performance of part of an agreement and give damages for the non-performance of the rest. Sir H. M. CAIRNS'S Act (21 & 22 Vict. c. 27, § 2) does not authorize this, for it applies only where the Court has jurisdiction to decree specific performance, which here, we submit, it has not.

Mr. Freeling, in reply. — The authorities support the view, that there is jurisdiction to give specific performance of part and
* 145 damages * for the non-performance of the rest. *De Brassac* v. *Martin*, (*e*) *Rogers* v. *Challis*, (*g*) *Chinnock* v. *Sainsbury*, (*h*) *Howe* v. *Hunt*, (*i*) *Cory* v. *Thames Iron Work and Ship-Building Company*. (*k*)

Judgment reserved.

(*a*) Johns. 669.
(*b*) 1 Johns. & H. 319; 3 Giff. 396.
(*c*) 7 De G., M. & G. 328.
(*d*) 25 Beav. 348.
(*e*) 11 W. R. 1020, V. C. W.
(*g*) 27 Beav. 175.
(*h*) 9 W. R. 7, M. R.
(*i*) 31 Beav. 420.
(*k*) 11 W. R. 589, V. C. W.

March 16.

The Lord Justice TURNER, after stating the facts of the case, and observing that when the appeal was heard he had felt considerable doubt whether it could be disposed of without the oral examination of some of the deponents, but that on further consideration he was satisfied that such examination was not necessary, proceeded to dispose of the points taken by the defendant, except those relating to the repairs and improvements, and then continued as follows:—

It was also insisted on the part of the defendant, that the Court could not decree specific performance of that part of the agreement which relates to the spirit vault and the repairs; but I have felt no difficulty on this point, for these matters are mere incidents of the agreement, not affecting its substance, and I have no doubt of the power of the Court to provide for them, otherwise than by directing the work to be done. Lastly, it was said on the part of the defendant, that Sir HUGH CAIRNS'S Act does not apply to the case, and that the decree, therefore, was wrong as to the damages; but I think that, there being jurisdiction for specific performance, it was in the power of the Court to direct the inquiry as to damages, under the provisions of the * Act. My opinion * 146 therefore is, that this appeal is without foundation, and ought to be dismissed. If the case had rested with me, I should have thought it proper to dismiss the appeal with costs; but my learned brother being of opinion that it should be dismissed without costs, I yield to his opinion on that point.

THE LORD JUSTICE KNIGHT BRUCE.—The evidence appears to me to be in an unsatisfactory state, and my opinion was, and is, that it would be a right course to have certain witnesses examined orally here before disposing of the case. The opinion of my learned brother, however, differs from mine, and I need not say that it is very likely to be right. I cannot much regret the conclusion at which he has arrived, because it would be a great expense to have the witnesses brought up here, and the operation would be of a very uncertain result. The matter must end so far as we are concerned.

* 147 * ELSEY *v.* ADAMS.

1864. March 18. Before the LORDS JUSTICES.

A bankrupt was refused his certificate on the ground of fraudulent concealment of property. Subsequently a consent order for annulling the bankruptcy was obtained, in consideration of a friend of the bankrupt's paying a sum to the creditors. After this the assignees discovered that other property to a large extent had been concealed by the bankrupt, and they presented a petition to discharge the annulling order, as having been obtained by fraud, and before this petition had been heard filed a bill to restrain the bankrupt from getting in the concealed property. The petition was ultimately dismissed by the Lord Chancellor, on the ground that the assignees having, when they consented to the annulling order, been aware of previous fraudulent concealment, could not be held to have consented to the order on the faith of the bankrupt's having made a full disclosure of his property. *Held*, that the proceedings in the cause ought to be stayed, without costs.[1]

THIS was an appeal motion by the defendant to discharge or vary an order of Vice-Chancellor STUART, by which, on the application of the plaintiffs, all further proceedings were stayed without any direction as to costs.

The defendant Samuel Adams had been adjudicated bankrupt in July, 1856. The plaintiffs were chosen creditors' assignees. In April, 1857, the bankrupt passed his last examination, having made the usual declaration under his hand, that he had made a full disclosure of his estate and effects. In May, 1858, his certificate was absolutely refused, on the ground of his having made a false statement to account for part of his estate.

In December, 1859, Adams applied to the assignees to consent to his bankruptcy being annulled, on the terms of his paying into the hands of the official assignee for the benefit of his creditors the sum of 500*l.*, to be provided by a friend. The assignees, believing that they had realized and distributed the bankrupt's whole property, assented to the proposal; and the bankrupt having obtained the consent of the requisite number of creditors,
* 148 an order was made on the 4th of May, 1860, * annulling the adjudication without prejudice to any acts done by the assignees, and without prejudice to the right of the creditors to

[1] See 1 Dan. Ch. Pr. (4th Am. ed.) 791.

receive the 500*l.*, and any other sum in the hands of the official assignee.

On the 5th of May, 1863, the assignees presented their petition to the Court of Bankruptcy, alleging that they had recently discovered that Adams had not made a full disclosure of his estate, but had concealed considerable sums of money, and was now taking steps to enforce payment of various sums of money due to him at the time of his bankruptcy, and not disclosed by him. The petition asked that the order of the 4th of May, 1860, might be discharged, on the ground that their consent to it had been obtained by fraud and wilful concealment.

On the 8th of May, 1863, the assignees filed their bill in this suit, stating the above circumstances, and setting out the particulars of two sums due to the bankrupt at the time of his bankruptcy and concealed by him from the plaintiffs, which sums he had, since the 4th of May, 1860, taken proceedings at law and in equity to recover, and was now on the point of receiving. The bill asked for an injunction to restrain Adams from receiving, or taking any step to recover, either of those sums, and from receiving, or taking any step or proceeding to recover, enforce, or receive, any sum or sums of money, property, or security, on account or in respect of any debt, claim, transaction, matter, or thing owing or subsisting at the time of or prior to his bankruptcy, until the hearing of the cause or further order.

On the 18th of June, 1863, Mr. Commissioner FANE made an order that an inquiry should be instituted by examination of the bankrupt and all other necessary * parties, for the * 149 purpose of discovering the extent and particulars of the concealment alleged in the above-mentioned petition.

On the 22d of July, 1863, the Lord Chancellor discharged the last-mentioned order and dismissed the petition of the assignees, on the ground that, as appeared on the allegations of their petition, they were aware in 1858 that the bankrupt had made false and fraudulent statements in his examination in bankruptcy, and that therefore they could not be heard to say they had been deceived by his declaration that he had made a full disclosure of his estate. His Lordship however refused to give Adams any costs, saying, that to give them would be a premium to dishonesty.

On the 20th of August, 1863, Adams filed a plea, pleading the

order of July, 1863, in bar to the whole of the discovery and relief sought by the bill.

On the 19th of November, 1863, the plaintiffs moved before Vice-Chancellor STUART for an order to dismiss their bill without costs. The Vice-Chancellor considered that, as it was possible that the Lord Chancellor might sanction an appeal to the House of Lords from his decision on the petition, it was more proper to stay proceedings than to dismiss the bill, and his Honor accordingly made an order staying all proceedings in the suit, without any direction as to costs, which order the defendant now moved to discharge or vary.

Mr. Malins and *Mr. Herbert Smith*, for the defendant, in support of the motion. — This order is without precedent as to form, and, as we submit, is on the merits erroneous. The plaintiffs had
* 150 no title when the bill was filed, for the superseding order * was then in force, and they never succeeded in establishing any.

[The Lord Justice TURNER referred to the case of a bill by next of kin to preserve property pending proceedings as to the validity of a will.]

In that case the next of kin have a *primâ facie* title till the will is proved; here the *primâ facie* case was against the plaintiffs, the superseding order being in force, which must be presumed valid till it is discharged; moreover, in case of a disputed will, there is no legal hand to receive the money pending the litigation. Even where the title of a plaintiff has been cut from under him by an Act of Parliament, his bill has been dismissed with costs. *Hand* v. *King*. (*a*) The only exception to the dismissal of the bill with costs is, where the bill fails owing to an alteration in the state of the law taking place after it is filed, or where, as in *Lister* v. *Leather*, (*b*) the plaintiff has been misled owing to a mistake of the Court.

Wilde v. *Wilde* (*c*) was also referred to.

Mr. Bacon and *Mr. Hardy*, for the plaintiffs. — This suit was

(*a*) 10 Jur. (N. S.) 91, V. C. W.
(*b*) 1 De G. & J. 361.
(*c*) 10 W. R. 503, L. J.

instituted on reasonable grounds, and we submit that the Court will not interfere with the Vice-Chancellor's order staying proceedings without costs when it had become useless. The Court has a discretion as to costs, and may look at the moral circumstances of the case. That Adams was guilty of the frauds alleged has been confessed by himself on his cross-examination, and the assignees did no more than their duty in filing a bill to protect the property pending the proceedings in the Court of Bankruptcy. The petition to rescind the superseding order was dismissed, not because the case against Adams was not established, but because the Lord Chancellor considered that the assignees, who, when they consented * to the superseding order, knew that * 151 Adams had been guilty of fraudulent concealment, were personally estopped from asserting that they had consented on the faith of his statements being true.

Mr. Malins, in reply. — The general rule applicable to this case is laid down in *Anon.* (*a*) and *Dixon* v. *Parkes*. (*b*) There is no precedent for departing from it, except where the law has changed in the interval since the bill was filed. *Wilde* v. *Wilde* is in our favour.

THE LORD JUSTICE KNIGHT BRUCE. — The bill in this case was filed pending a litigation in the Court of Bankruptcy, and for the purpose of protecting, pending that litigation, the property which was the subject of it. The litigation was commenced in my opinion, fairly and with a considerable prospect of success. After the bill had been filed, that litigation became, to a certain extent, in substance, if not in form, successful. An inquiry was directed which would, in my judgment, have established the plaintiffs' case. The order directing that inquiry was appealed from. The Court of appeal was of opinion, not that the inquiry would have been answered in a manner favourable to the bankrupt, but that for certain reasons, whatever the merits of the case might be, the inquiry ought not to have been directed. Then came the question, whether the suit for the protection of the property should go on or be stopped, and, if stopped, whether the costs ought to be paid by the plaintiffs. The Vice-Chancellor was asked to stop the suit, and

(*a*) 1 Ves. Jr. 140. (*b*) 1 Ves. Jr. 402.

not charge the plaintiff with the costs; and his Honor accordingly made an order staying the proceedings without costs.

* 152 * In my opinion, it has for many years been a clearly established principle of the Court, that the Court has jurisdiction to stay proceedings in a suit without making the plaintiff pay costs; and the only question is one of merits, whether in the circumstances of this case, it was a proper exercise of judicial discretion to stay the proceedings without making the plaintiff pay costs. Where a judicial discretion has been exercised consistently with the course of the Court as to costs alone, the Court of appeal is very reluctant to interfere with that discretion, and does not interfere, unless in a case of principle, or a case very clear on the merits. Not only do I not differ from the view of the Vice-Chancellor in this present case, but I entirely agree with him, and believe that if I had originally heard the case, I should have come to the same conclusion as he has done. The appellant had been guilty of fraud; the assignees, though after what looks like negligence, acted laudably in attempting to protect the remaining property, and they acted substantially, though not in form, under the directions of the commissioner. Had I entertained a somewhat different view from the Vice-Chancellor, I should, in a case of this nature, have been slow to differ from him as to the conclusion, but I entirely agree in the conclusion at which he arrived.

THE LORD JUSTICE TURNER. — This is a case of some importance, and, to my mind, not altogether free from difficulty; but, on the whole, I think that the order of the Vice-Chancellor is right. Where the whole subject-matter of a suit is taken away by an event occurring after its institution, the Court has jurisdiction to entertain an application by the plaintiff to stay proceedings, or dismiss the bill, with or without costs. Generally, a plain-

* 153 tiff who comes to stay proceedings * or dismiss his bill must give the defendant all that the defendant, in the view of the case most favourable to him, can be entitled to; the bill, therefore, will usually be dismissed with costs; but there may be special circumstances which will entitle the plaintiff to have his bill dismissed without costs. Now, what are the circumstances of the present case? It is indisputable that there had been gross fraud on the part of the defendant; but it is said that we have no jurisdiction to punish him for that fraud. That, no doubt, is correct;

but it is quite a different thing to say that we are not at liberty to look at that fraud with a view to its influence and effect on the question before us. I think that we are not only at liberty, but bound, to look at the circumstances under which the bill was filed. The fraud of the defendant is one of those circumstances, and is the material element in judging of the propriety of instituting this suit, and though the right of suit is gone, the fraud remains. It is said, that the defendant is not to be debarred of his civil rights because he has been guilty of fraud, and I agree that it is so; but it is one thing to say that, and another thing to say that he is to stand in the same position as if he were free from all imputations of fraud. He is entitled to sue, but still regard may be had to his fraudulent conduct. It is said, that the plaintiffs had not, when the bill was filed, any right to sue; but they had a right to come here to protect the property pending litigation. This is not, therefore, a case in which there was no right of suit when the bill was filed; but a case in which, if the plaintiffs had succeeded in supporting the order of the commissioner on their petition in bankruptcy, their suit would have been effectual. Several cases were cited during the argument, but it seems to me that none of them have any bearing on the present. The two cases in 1 Vesey, Jr., were cases where the plaintiff's title * had been taken away * 154 by an event subsequent to the institution of the suit. In *Wilde* v. *Wilde*, (*a*) the plaintiff had accepted the debt, and the Court would not hear the cause for the purpose of deciding as to costs. Suppose a bill were filed to impeach the sale of an estate on the ground of fraud, and pending the suit the estate were swept away by the sea or recovered by a paramount title, so that the suit must end in nothing, would not the Court stay proceedings, and would it not enter into the evidence to ascertain whether they should be stayed with or without costs? In my opinion, it certainly would; and on the same principle I think that the Vice-Chancellor had jurisdiction to make the order which he has made, and I think that he has rightly exercised that jurisdiction.

As there is important evidence before us on behalf of the plaintiffs, which was not before the Vice-Chancellor, the appeal motion ought, I think, to be refused without costs.

(*a*) 10 W. R. 503.

* 155 * CROFT *v.* GRAHAM.

1863. December 12, 14. Before the LORDS JUSTICES.

The repeal of the usury laws has not altered the rules of the Court as to dealings with expectant heirs, and, accordingly, where an extravagant young man, entitled in reversion to an estate, and very much pressed for money, had shortly after attaining twenty-one given to a money lender securities bearing an exorbitant rate of interest, they were ordered to stand as a security only for the sums actually advanced and interest thereon at 5*l.* per cent per annum.[1]

THIS was an appeal by the defendant from a decree of Vice-Chancellor STUART.

The plaintiff, who attained his majority on the 12th of August, 1859, was tenant in tail of a small landed property, subject to his father's life-interest. In 1858 he was an undergraduate at Oxford, and in or before that year dealings commenced between him and the defendant, who was a money-lender. In October, 1859, shortly after the plaintiff's attaining twenty-one, he paid the sum of 900*l.*, being the amount which the defendant claimed to be due from him in respect of these dealings, the claim being partly for moneys advanced to the plaintiff, and partly for moneys advanced to other undergraduates for whom the plaintiff had become surety. On this occasion the notes and bills on which the plaintiff was liable were given up to him, and he signed a memorandum containing a list of them with their amounts, and admitting all accounts between him and the defendant to be settled up to that date.

In November, 1859, the plaintiff's father granted him a rent-charge of 180*l.* out of the estate of which the father was tenant for life. This it appeared was the plaintiff's whole income.

In 1860 the plaintiff, who was living an irregular and extravagant life, renewed his dealings with the defendant, who from time to time made advances of money to him on his acceptances.

* 156 The plaintiff, throughout the * course of these dealings, was in extremely embarrassed circumstances, as was perfectly

[1] See Tyler *v.* Yates, L. R. 11 Eq. 265; Earl of Aldborough *v.* Trye, 7 Cl. & Fin. (Am. ed.) 436, and notes (1) and (3); 1 Sugden V. & P. (8th Am. ed.) 276 *et seq.*, and notes 286, 287; Edwards *v.* Burt, 2 De G., M. & G. 55, and note (1); Webster *v.* Cook, L. R. 2 Ch. Ap. 542; Kerr F. & M. (1st Am. ed.) 344; 2 Dart V. & P. (4th Eng. ed.) 693.

well known to the defendant, who admitted that he knew the plaintiff to have been "very much pressed for money."

On the 15th of June, 1861, an account in writing of these subsequent dealings was settled and signed by the plaintiff and defendant, by which it appeared that the sum of 3000*l.* was due from the plaintiff to the defendant. In some cases interest at the rate of 60*l.* per cent per annum, or more, was charged on the plaintiff's overdue acceptances. In the course of this year a negotiation went on relative to the plaintiff's giving the defendant a mortgage on his interest in the family estate for what was alleged to be due, with interest at 8*l.* per cent per annum, and a draft was prepared, but the mortgage was never executed.

On the 8th of November, 1861, a further sum was advanced by the defendant to the plaintiff, and the plaintiff, without any independent professional advice, and at the office of a solicitor to whom he was taken by the defendant, executed to the defendant a warrant of attorney empowering the defendant, in case of non-payment by the plaintiff of the sum of 3550*l.* on the 9th of December then next, to enter up judgment for 7100*l.*, and to take out execution for 3550*l.* with interest at the rate of 5*l.* per cent per month. The solicitor deposed that he fully explained to the plaintiff the nature and effect of the warrant of attorney.

It did not appear on the evidence that the defendant had endeavoured to entrap the plaintiff into borrowing from him, and several letters from the plaintiff to the defendant containing urgent entreaties for advances were put in evidence. It was, however, clear on the * evidence that the defendant, in making * 157 these advances, had fully availed himself of the plaintiff's necessities. Thus, for instance, the defendant, on cross-examination, said, "On the 10th of September, 1859, I discounted a promissory note of the plaintiff's at fourteen days' date for 500*l.* I cannot say what consideration I gave for that note. I cannot identify any of the entries in my banker's book with any payments for that bill. I will swear that I gave him money for that note. I cannot say whether I gave him 100*l.* for it. I cannot say whether I even gave him 50*l.* for it. I don't know." . . . "He (the plaintiff) gave me two bills for 100*l.* each in November, 1861, or promissory notes. Those are two of the notes on which I claim now as against the plaintiff. I gave the plaintiff 20*l.* for those two notes, — about 20*l.* I think. I gave him more than 10*l.*"

Default in payment of the 3550*l.* having been made, the defendant, on the 9th of January, 1862, entered up judgment for the 7100*l.* and costs, and on the following day a writ of *elegit* was issued for levying 3584*l.* 6*s.* 11*d.*, and registered under 23 & 24 Vict. c. 38. On the 14th of January notice of this was served on the plaintiff's father, who had only a few days previously become aware of the state of the plaintiff's affairs.

On the 1st of February, 1862, the plaintiff filed his bill, which was subsequently amended, praying that it might be declared that the plaintiff was chargeable upon the several securities obtained from him by the defendant as aforesaid, for such sums only as had been actually advanced to the plaintiff, with interest thereon after the rate of 5*l.* per cent per annum, and for an account of what was due on that footing, and that upon payment the defendant might be ordered to deliver up the warrant of attorney, bills of
* 158 exchange, promissory * notes, and other securities, and to enter up satisfaction on the judgment, the plaintiff offering by his bill to pay what should be found due on taking the above account.

Vice-Chancellor STUART, on the 3d of June, 1863, made a decree to the following effect: —

The plaintiff, by his counsel, consenting that the warrant of attorney, dated the 8th of November, 1861, for 7100*l.* should stand as a security for the sums actually paid or advanced by the defendant to or for the use of the plaintiff, or by his order, with interest thereon from the date of such payments or advances at the rate of 5*l.* per cent per annum, it was ordered: 1st. That an account should be taken of all sums so paid or advanced by the defendant to or for the use of the plaintiff, or by his order, with interest thereon from the date of each payment or advance at the rate of 5*l.* per cent per annum. 2d. That an account should be taken of all sums paid by the plaintiff to the defendant on account of such payments or advances. And it was ordered, that what should appear to be due on the second account should be deducted from what should appear to be due on the first account, and that the balance should be certified, and that upon payment by the plaintiff to the defendant of the amount of the balance so certified, the defendant should deliver to the plaintiff upon oath all securities

in his possession or power relating to the matters in question in the cause, and should, at the expense of the plaintiff, enter up satisfaction upon the judgment of the 9th of January, 1862. No costs were given up to that time, but further consideration of the cause and of the subsequent costs was adjourned.

The defendant appealed from the whole of this decree.

* *Mr. Bacon* and *Mr. Freeman*, for the plaintiff, in support * 159 of the decree.—This is the case of an expectant heir who fell into the hands of a money-lender before attaining twenty-one. The plaintiff was completely in the power of the defendant, and it would be contrary to all the rules and the course of the Court as to dealings with expectant heirs to treat the alleged settlements of account as binding, or to treat the securities as good for any thing more than what was really advanced, with interest at 5*l.* per cent.

Mr. Malins and *Mr. Cracknall*, for the appellant.—There is no equity on the ground of the rate of interest being high. The usury laws having been repealed, any rate of interest is legal, and the Court will not readily presume that a rate agreed upon by the parties is exorbitant. What rate of interest is reasonable depends on the risk. Nobody can be expected to lend or will lend money at 5*l.* per cent on a precarious security. If the plaintiff had died in the lifetime of his father the defendant would have lost all that was owing to him. So the case is one in which a very high rate of interest was reasonable, and it is not just that it should be cut down to 5*l.* per cent, a rate at which no sane person would have lent money to the plaintiff. It is perfectly clear that the plaintiff can never have considered that he was borrowing money at 5*l.* per cent; if he had been misled in that respect, the case would have stood on a very different footing, but why is the plaintiff to have money on terms on which he never expected to get it, and on which nobody would have lent it to him? The Court can do no good by interfering with transactions of this nature. They are not like loans on security; they are speculations, the risk of losing the whole of the sums advanced being very great. If the engagements of persons * who borrow money, without being * 160 able to give any reasonable security, are to be set aside on the ground that the rate of interest is too high, the result will be,

that persons in that position will be put upon still harder terms in borrowing, since the lenders must take into account the risk of a Chancery suit. The dealings prior to the 26th of October, 1859, were closed on that day, and the balance paid; the plaintiff could not have had any equity as to them if there had been no subsequent transactions, and the subsequent transactions cannot create such an equity, being entirely independent of the earlier ones. The securities do not include any claim in respect of the transactions before the 26th of October, 1859. The account, therefore, ought to be confined to dealings since that date, even if any account is directed at all. But we submit that the Court cannot go behind the judgment at law. At all events, even if the Court is against us on all the other points, this being in fact a redemption suit, the decree ought to direct a dismissal of the bill with costs, if the plaintiff does not pay what is found due from him.

THE LORD JUSTICE KNIGHT BRUCE.—The decree in this cause is a matter of course, unless this Court and the laws of the country are to be reconstructed with a view to this particular case. There is not a material fact in dispute from beginning to end. The plaintiff was a young extravagant Oxonian, entitled in remainder or reversion expectant on the decease of his father to estates, which do not appear to be very large. The income allowed him was about 180*l.* a-year, which he found insufficient to meet his expenses. He was introduced to the defendant, a money-lender, and dealings took place between them during the plaintiff's minority. These are, in some manner, settled; an interval
*161 * of peace and tranquillity succeeds, and then the dealings are renewed. Something called a settlement of accounts takes place, and certain securities are given by the plaintiff to the defendant. Throughout these transactions the parties were not on equal terms, but one of them was in the power of the other. It would be a disgrace to the Court if these securities were allowed to stand for more than the moneys really advanced, with interest at a reasonable rate. The decree gives the defendant interest at 5*l.*, not at 4*l.* per cent, and in that respect I am not disposed to alter it in the plaintiff's favour; but that the account should stand as a settled account, and that the securities should stand as securities for any thing more than the sums advanced, with interest at the rate allowed by the decree, are propositions which cannot be

supported by reasonable argument. I am surprised at the appeal, and, speaking respectfully, I am surprised at some of the arguments addressed to us on behalf of the defendant. I think that the decree should be varied by inserting a direction for the dismissal of the bill with costs, in case the plaintiff should make default in payment of what shall be found due from him (a direction which the Vice-Chancellor, no doubt, would have given if his attention had been called to the point), but this variation ought not, in my judgment, to affect the costs of the appeal, which must be paid by the appellant.

THE LORD JUSTICE TURNER. — I am of the same opinion. I do not see how the Vice-Chancellor could have done otherwise than make a decree in favour of the plaintiff, unless he had affirmed *Mr. Cracknall's* proposition, that the repeal of the usury laws has altered all the rules of this Court as to dealings with expectant heirs. I am satisfied that those rules * have not been * 162 so altered, and I remember Lord LANGDALE'S so deciding in a case very similar to the present. I entirely agree in the observations of my learned brother.

WOODHAMS *v.* THE ANGLO-AUSTRALIAN AND UNIVERSAL FAMILY LIFE-ASSURANCE COMPANY.

1864. February 9, 10. March 19. Before the LORDS JUSTICES.

An arrangement was made between company A. and company P., both registered under 7 & 8 Vict. c. 110, that the assets of company A. should be made over to company P.; that the shareholders of the former should become shareholders in the latter and execute its deed of settlement, and that company P. should indemnify them against all their liabilities as shareholders in company A. After a decree, by which it was settled that those shareholders in company A. who had declined to become shareholders in company P. were not entitled to indemnify under this covenant, one of them bought up the benefit of a decree obtained by a creditor against company A., and a writ of *fi. fa.* having been issued against that company, to which a return of *nulla bona* was made, he applied for leave to issue execution against one of the shareholders in company A., who had become a shareholder in company P. *Held*, that this was a fraudulent use of the debt, and that the rule that a

partner cannot buy in a debt of the firm and enforce it against his copartners applies equally as between shareholders in joint-stock companies.

Semble, that as the shareholder who executed the deed of company P. had never made any transfer of his shares in company A., and that company had never been wound up or dissolved, he did not, by executing the deed of company P., cease to be a shareholder in company A. so as to escape from liability for its debts.

THIS was an appeal motion by Mr. Richard Collins to discharge an order of Vice-Chancellor STUART directing execution to issue against him for a debt, payment of which had been decreed in this cause against the Anglo-Australian and Universal Family Life-Assurance Company, in which Mr. Collins was a shareholder.

The Anglo-Australian Company and another insurance company, called the British Provident Life and Fire Assurance Society, were companies registered under the Act 7 & 8 Vict. c. 110. On the 1st of June, 1858, a deed was executed, by which it was *163 agreed that these * companies should be amalgamated; and by this deed it was provided, that the shareholders of the Anglo-Australian Company should become shareholders in the British Provident Company and execute its deed of settlement, and that the assets of the former company should be made over to the latter, and that the shareholders of the Anglo-Australian Company, upon executing the deed of settlement of the British Provident Company, should, out of the funds and property of that company, be absolutely held harmless and indemnified against all and any liabilities in respect of the Anglo-Australian Company by reason of their execution of the deed of settlement. In pursuance of this agreement the assets of the Anglo-Australian Company were made over to the British Provident Company, and a number of shareholders in the Anglo-Australian Company executed the deed of settlement of the British Provident Company for the same number of shares as they held in the Anglo-Australian Company, this being the mode in which, according to the amalgamation deed, the amalgamation was to be effected. Others, however, of the shareholders, and amongst them William Webster a holder of 500 shares, the real respondent on the present occasion, declined to become shareholders in the British Provident Company, never became such, and never executed that company's deed.

About the end of 1859, one of the shareholders in the Anglo-Australian Company, who, like Mr. Collins, had executed the deed

of the British Provident Company, presented a petition to wind up the Anglo-Australian Company, and at the same time a shareholder in the British Provident Company presented a petition to wind up that company. The petitions were heard together by Vice-Chancellor KINDERSLEY in January, 1860, and the petition to wind up the Anglo-Australian Company *was dismissed, his Honor saying that the case resolved itself into this: "Those who joined in the amalgamation and insist that it ought to be carried into effect, — the result of which would be that the shareholders in the British Provident Society, themselves being of that number, would have to pay all the debts of the Anglo-Australian Company in exoneration of the shareholders of that company, — now come and ask that the Anglo-Australian Company shall be wound up; in other words, that the shareholders in the last-mentioned company shall contribute with them to pay the debts in respect of which they have agreed to exonerate the Anglo-Australian Company's shareholders." (*a*) The petition for winding up the British Provident Company was ordered to stand over. *164

Shortly after this, the Anglo-Australian Company filed their bill against the British Provident Company, to compel them to carry into execution the contract of indemnity contained in the deed of amalgamation.

In March, 1861, an order was made by Vice-Chancellor KINDERSLEY for winding up the British Provident Company. Mr. Collins was put on the list of contributories of that company, and paid all the calls made upon him as such.

In June, 1861, the official manager of the British Provident Company, by leave of the Court, filed a cross-bill to set aside the deed of amalgamation.

The two causes were heard together before Vice-Chancellor STUART, and on the 18th of January, 1862, his Honor dismissed the cross-bill, and made a decree declaring that the official manager of the British Provident *Company was bound, out of the funds and property of that company, to indemnify the Anglo-Australian Company and the shareholders thereof against all liabilities of the last-mentioned company, by reason of their execution of the deed of settlement of that company. (*b*) An *165

(*a*) *Re* Anglo-Australian Company, *Ex parte* Smith, 1 Drew. & Sm. 113.

(*b*) The Anglo-Australian Assurance Company *v.* The British Provident Assurance Society, 3 Giff. 521 [S. C., 4 De G., F. & J. 341].

appeal was brought from this decree, and by an order of the Lord Chancellor, dated the 15th of April, 1862, it was varied by striking out the words, "and the shareholders thereof," his Lordship being of opinion that those shareholders in the Anglo-Australian Company, who had not become shareholders in the British Provident Company, had no claim to any express indemnity from that company against the debts and liabilities of the Anglo-Australian Company. (*a*)

The Anglo-Australian Company carried in a claim for about 20,000*l.* under the order for winding up the British Provident Company, in which amount the sum due to Mr. Woodhams under the decree in the present suit was included. In May, 1862, Webster was appointed one of the creditors' representatives in the winding up of the British Provident Company, the Anglo-Australian Company voting in the choice.

In December, 1861, Mr. Woodhams had obtained a decree in the present suit against the Anglo-Australian Company for payment of what should be found due to him on an account thereby directed. (*b*) The amount was afterwards, in June, 1862, certified by the chief clerk under the decree. On the 5th of August, 1862, the plaintiff issued a writ of *fi. fa.* for this amount, which was returned
* 166 *nulla bona.* A Mr. Gover was the solicitor * of the Anglo-Australian Company, and defended them in this suit, in which he also acted for Webster, who took a part in the defence. Mr. Gover was the son-in-law of a Mr. Burgess, and in September, 1862, the decree in the suit instituted by the Anglo-Australian Company against the British Provident Company having been varied, as mentioned above, in the previous April, Mr. Webster procured Mr. Burgess to take a transfer of Mr. Woodham's debt to himself as a trustee for Webster, and the following memorandum, dated the 1st of September, 1862, was signed: "Memorandum that Mr. Burgess has, at the request of Mr. Webster, this day taken a transfer of the debt owing by the Anglo-Australian and Universal Family Life Assurance Company to James Woodhams, and paid to the said James Woodhams the sum of 266*l.* 15*s.* 2*d.* as the consideration for such transfer, and the sum of 2*l.* 2*s.* for his costs of the perusal and execution of the deed of assignment, and that the said Mr. Webster hereby agrees to indemnify the said

(*a*) 10 W. R. 588. (*b*) 3 Giff. 238.

Mr. Burgess against any loss which he may sustain by such transfer and any costs which he may incur in endeavouring to enforce payment of the said debt, and has deposited with the said Mr. Burgess the sum of 270*l.*, to be held by him as a security against any such loss and costs, and to be held by him until full payment thereof; any surplus to be returned to the said Mr. Webster, and any deficiency to be made good by him."

After this transfer, Webster applied in the name of the plaintiff for an order directing execution to issue against Collins, as a shareholder in the Anglo-Australian Company, for the debt established in this suit against that company. Though Webster was not the nominal applicant, the fact that the application was in substance his, and that the plaintiff had no interest, was brought out * on cross-examination. The Vice-Chancellor STUART, on * 167 the 25th of November, 1863, made an order directing execution to issue, which order Collins now moved to discharge.

Mr. Bacon and *Mr. Karslake*, for the appeal motion. — We say, in the first place, that Collins ceased to be a shareholder more than three years ago, when the two companies were amalgamated. Secondly, we say that Webster is making a fraudulent use of the debt of Woodhams. Webster is liable to this debt, as well as Collins, and he has no right to make use of the name of a creditor to compel Collins to pay the whole of it. It is clear that a partner cannot buy up a partnership debt and compel payment of it by his copartner. Thirdly, Woodhams has not used due diligence to recover his debt; he ought to have taken proceedings to wind up the Anglo-Australian Company, and then his debt would have been provided for. Fourthly, Woodhams ought to have proved his debt under the winding-up of the British Provident. Fifthly, Webster has adopted the proof by the Anglo-Australian against the British Provident, and cannot have a double remedy.

Mr. Malins and *Mr. Shebbeare*, in support of the order appealed from. — The Anglo-Australian Company must still be deemed a subsisting company, for it has never been dissolved or wound up, and Collins, never having transferred his shares, is still a shareholder in it. Even if there had been a winding-up order the right of Woodhams as a creditor would not be affected, 7 & 8 Vict. c. 110, §§ 13, 25; 11 & 12 Vict. c. 45, § 58. The company has been

recognized as a subsisting company in the suit against the British Provident. Even if there were a winding-up order, the share-
* 168 holder might be sued. *Palmer* * v. *Justice Assurance Society*, (*a*) *Morisse* v. *The Royal British Bank*, (*b*) *Hill* v. *London and County Assurance Society*. (*c*) This proceeding is by Woodhams, a simple creditor. The Court will not look to the beneficial interest, nor attempt to administer equities which are not regularly before it. The rule that a partner cannot buy up a debt and sue his copartner has no application to shareholders, between whom no relation of mutual confidence exists. As to due diligence, no more is required when a *fi. fa.* has been issued against the company and returned *nulla bona*. Woodhams could not prove his debt against the British Provident, that company not being his debtor, and his acceding in his official character to the proof against the British Provident cannot affect his private rights. [*Greenwood's Case* (*d*) was also referred to.]

Mr. Karslake, in reply.

Judgment reserved.

March 19.

The Lord Justice TURNER, after stating the facts of the case and the points raised by the appellant in argument, proceeded as follows: —

On none of these points do I mean to give a concluded opinion, except upon the question as to the use sought to be made by Mr. Webster of Mr. Woodhams's debt. It is right, however, to say that, as at present advised, I do not think that any of the other points could be maintained on the part of the appellant. As to the first point, namely, that Mr. Collins on his executing the deed of
* 169 the British Provident Company, which he executed * more than three years before the application to the Vice-Chancellor for the order now under appeal, ceased to be a shareholder in the Anglo-Australian Company, and, therefore, was not, at the time of that application, in any way liable for the debts of that company; it is to be observed that there has never been any

(*a*) 6 E. & B. 1015.
(*b*) 1 C. B. (N. S.) 67.
(*c*) 1 H. & N. 398.
(*d*) 3 De G., M. & G. 459.

transfer of the appellant's shares in the Anglo-Australian Company, and that although, in consequence of what has been done, it may be liable to be dissolved and wound up, it is still, so far as I can see, a subsisting company. There has been no order to dissolve or wind it up, and I do not think that it is competent to a shareholder in a subsisting company to get rid of his liability to its creditors merely by electing to leave the company and become a shareholder in another company without making any transfer of his shares. To hold that a shareholder could do this, would, as it seems to me, be contrary not only to the express provisions of the Act 7 & 8 Vict. c. 110, but to its spirit and purpose, the plain object of the Act being that by the returns to be made of transfers of shares the creditors of companies should know to whom they are to look for payment. If, therefore, the appellant's case depended on that point, I am strongly disposed to think that it could not be maintained.

As regards the question, whether due diligence has been used in obtaining payment from the Anglo-Australian Company, the cases appear to me to establish that due diligence must be taken to have been used when a *fieri facias* has been issued against the company and there has been a return of *nulla bona*. As to Mr. Webster's being bound to prove against the British Provident Company, I can see nothing to constitute him a creditor of that company so as to enable him to prove; nor do I think that what he may have done in his character of creditors' representative of the British * Provident Company can be held to amount to * 170 an adoption of the liability of that company instead of the liability of the Anglo-Australian Company. I am disposed to think, therefore, though it is unnecessary to give any concluded opinion on the question, that on none of those points could the contention of the appellant be maintained.

The case turns, in my opinion, on the mode in which Mr. Webster has attempted to use the debt of Mr. Woodhams. [His Lordship here referred to the facts particularly bearing on this part of the case, and read the memorandum of the 1st of September, 1862.] The case then stands thus: Mr. Webster having, in consequence of the alteration made by the Lord Chancellor in the Vice-Chancellor's decree, failed to get an indemnity against the liabilities of the Anglo-Australian Company, set to work to get that indemnity by taking an assignment to a trustee for himself of

a debt due from the Anglo-Australian Company and then seeking to enforce the debt against Mr. Collins, a shareholder in that company who had joined the British Provident Company. Under the order now under appeal Mr. Webster has obtained a right to do this, and so to compel Mr. Collins to pay the whole debt, and that in a case where Mr. Webster has, and Mr. Collins has not, power to obtain an order to wind up the Anglo-Australian Company. In my opinion this is a fraudulent use of the debt, which we ought not to tolerate. Mr. Webster may have a legal right to make use of the name of Mr. Woodhams, and to enforce the debt in this mode; but it is a right, against the exercise of which this Court will interfere. It was admitted at the bar that what Mr. Webster is now attempting could not be done in the case of an ordinary partnership; that a partner would not be allowed by a Court *171 of Equity to take an assignment of a debt owing * by the partnership and sue his copartners upon it;[1] but it was said that shareholders are not partners. In my opinion they are partners for this purpose at least, that the Court will take care that there is honest and just dealing between them. It cannot indeed be said that they are not partners even further than this, for the winding-up Acts proceed on the principle that there is a partnership between shareholders. They were passed because in consequence of the great number of shareholders in a company it was impossible that the ordinary remedies applicable to common cases of partnership could be resorted to between them.[2] Upon principle, therefore, I am of opinion that Mr. Webster was not entitled to take the course he has taken. But in addition to this, I think that the case is concluded by authority. The cases of *Taylor* v. *Hughes*, (*a*) *Cutts* v. *Riddell*, (*b*) and *Bargate* v. *Shortridge* (*c*) appear to me to settle the rule, that creditors' debts cannot be used in this way. I am of opinion that the order of the Vice-Chancellor ought to be discharged, and the application to the Vice-Chancellor re-

(*a*) 2 Jo. & Lat. 24.
(*b*) 1 De G. & Sm. 226.
(*c*) 5 H. L. Cas. 297.

[1] Where one of two persons jointly liable for a debt, pays it, he cannot afterwards enforce it against the other in the name of the original creditor. See Brackett *v.* Winslow, 17 Mass. 153; Hammatt *v.* Wyman, 9 Mass. 133; Adams *v.* Drake, 11 Cush. 504; Page *v.* M'Crea, 1 Wend. 167.

[2] See Angell & Ames Corp. (9th ed.) § 591 *et seq.*; Williams *v.* Bank of Michigan, 7 Wend. 542; Collyer Partn. (5th Am. ed.) § 1078; 1 Lindley Partn. (Eng. ed. 1860) 2, 3.

fused with costs; but I do not think it a case for making the respondent pay the costs of the appeal motion. Our order does not leave Mr. Webster without remedy, for I apprehend that it is clearly in his power to obtain an order for winding up the Anglo-Australian Company, and under that order justice would be done between him and Mr. Collins.

THE LORD JUSTICE KNIGHT BRUCE. — At the conclusion of the argument in this case my impression was, that, with all deference to the Vice-Chancellor, I could not agree with his decision. Upon *further consideration, my impression *172 that the order under appeal could not stand was confirmed, but I felt great difficulty as to what order should be substituted for it, in case the Lord Justice should not be prepared to go the length of concurring in such an order as that which he has now proposed. In making that order I readily accompany him.

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*COPPARD *v.* ALLEN. *173

1864. April 13, 14. May 30. Before the LORDS JUSTICES.

Where a bill by a *cestui que trust* is not confined to seeking relief in respect of a particular breach of trust, but a general account of the trust estate is also sought, the General Order, Consol. Ord. VII. 2, does not dispense with the necessity of all the trustees being represented in the suit. Where, therefore, a bill was filed against a surviving trustee seeking a general account of the trust estate on the footing of wilful neglect and default: *Held*, that the legal personal representatives of a co-trustee who had died shortly before the filing of the bill, after having acted and received assets jointly with the surviving trustee, were necessary parties to the suit.[1]

THIS was an appeal by Alfred Allen, one of the defendants, from part of a decree of Vice-Chancellor STUART. (*a*)

The bill was filed by a creditor on behalf of himself and all other the creditors entitled to the benefit of a deed executed by Richard

(*a*) 4 Giff. 497.

[1] See 1 Dan. Ch. Pr. (4th Am. ed.) 248, 268, 269; Lewin Trusts (5th Eng. ed.), 714; Perry Trusts, § 876.

Gates for the benefit of his creditors. The only defendants to the bill were Allen and Gates.

The deed in question was dated the 31st of August, 1851, and was made between Richard Gates of the first part, Fielder King, James Rhodes, and the defendant Allen of the second part, and the executing creditors of the third part. The parties of the third part thereby granted to Gates license to conduct his trade, and collect, get in, and dispose of his effects, under the inspection of King, Rhodes, and Allen, till the 30th of August, 1852, if he should so long live and observe the stipulations on his part contained in the deed; and they agreed in that event not to take proceedings to enforce payment of their debts during that period. Gates, on his part, covenanted that he would, when required by the inspectors, make out a true account of his property and the incumbrances thereon, and use his best endeavours to get it in for the benefit of the creditors, and would from time to time, * 174 when the moneys received should be sufficient to * pay 2*s.* 6*d.* in the pound on his debts, pay the same ratably among his creditors until they were paid in full, and would until such payment deposit the moneys received by him in the London and County Bank at Horsham to an account to be opened for the purposes of the estate, or otherwise dispose thereof as the inspectors should from time to time direct. The deed also empowered the inspectors to prolong the time for realizing the estate for the further period of a year. Gates also covenanted that if at any time during the original or extended term his business should in the judgment of the inspectors become embarrassed or less adequate to answer the purposes of the deed, he would, at the request of the inspectors, convey and assign to them the then unapplied residue of his estate and effects for the benefit of his creditors. It was agreed that on any sale of any part of Gates's property the net purchase-money should be paid to the inspectors in trust to divide it among the creditors.

Rhodes went abroad in 1854, and remained out of the jurisdiction until long after the bill was filed. King died in the year 1861, about a year before the bill was filed.

The bill alleged that the three inspectors possessed themselves of the estate of Gates to an amount sufficient to have paid a considerable dividend on the debts; that they wasted and misapplied parts of it; that they might, but for their wilful neglect and de-

fault, have received considerable sums in respect of outstanding debts due to Gates and of other parts of his property, beyond what they actually received; that no dividend had ever been paid to the creditors, and that the inspectors had improperly retained in hand considerable balances belonging to the estate. The bill prayed that the trusts of the inspectorship deed might be carried into execution * under the decree of the Court; that * 175 an account might be taken of all the estate and effects of Gates received by Allen alone or jointly with any other person or persons, or which, but for his wilful default, might have been so received; that in taking such account Allen might be charged with interest on the balances which from time to time were in hand unapplied, with yearly rests, or otherwise as to the Court should seem fit; that he might be decreed to pay what should be found due from him on taking such account; that the moneys so paid and all other the remaining estate and effects of Gates might be duly applied for the benefit of the plaintiff and the other creditors; that a receiver might be appointed, and that if necessary there might be an injunction to restrain Allen from interfering with any part of the estate, and that Allen might be decreed to make proper compensation for all damage occasioned by his misfeasance and neglect, and also to pay the costs of the suit.

It appeared from the answer of Allen, and from the evidence of the cause, that he had acted in the inspectorship, and that some parts of the estate of the debtor had been possessed by him. He insisted, by his answer, that James Rhodes and the personal representatives of Fielder King ought to have been parties to the suit. He admitted that Rhodes was out of the jurisdiction.

The Vice-Chancellor overruled the objections as to parties, and made a decree directing an account to be taken of the estate of Gates received by Allen, either alone or jointly with any other person or persons, or which, but for his wilful neglect or default, might have been so received, directing the account to be taken with yearly rests, and charging Allen with interest on the balances, and ordered Allen to pay the plaintiff's costs of suit up to and including the hearing. The decree * also ordered Gates to pay into * 176 Court a sum of money admitted to be in his hands belonging to the estate. (*a*)

(*a*) 4 Giff. 497.

Allen appealed against the whole of this decree, except so much of it as directed the payment by Gates.

On the appeal being opened, on the 15th of March, the objection as to parties having been mentioned, their Lordships directed the appeal to stand over, liberty being given to the plaintiff to amend his bill by adding parties if he should be so advised. The plaintiff did not avail himself of this permission, and the appeal now came on again. Their Lordships directed the objection as to parties to be first argued. It was stated at the bar, and evidence was tendered to prove, that Rhodes was now within the jurisdiction. On the other hand, the plaintiff had filed an affidavit to prove that Rhodes was insolvent, and that King had died insolvent.

Mr. Malins and *Mr. Kay*, for the plaintiff, on the question of parties. — We submit that, according to the authorities, you may sue one executor or trustee without the other. Seton's Dec. (*a*) You may charge an executor or trustee with what has come to his hands, either alone or jointly with the other trustees or executors, for as soon as you establish a joint receipt, each becomes liable, and it is on him to discharge himself. The authorities, therefore, proceed on a correct principle, for the parties being jointly and severally liable, one of them may, according to Consol. Order VII. rule 2, be sued without the others.

* 177 * *Mr. Bacon* and *Mr. Rowcliffe*, for the appellant. — The moneys in this case were all paid to a joint account, and all the accounting parties ought to be here. The only order that could properly be made would have been to order the cause to stand over, with liberty to add parties. A decree ought not to be made against Allen alone, passing over the other parties who are equally liable with him.

[The Lord Justice Turner. — If all the parties were here, and the plaintiff, having obtained a decree against all, were to enforce it against you alone, you could not obtain contribution without a fresh bill. The only difference that the absence of these parties makes to you appears to be, that if the account is taken in their

(*a*) Vol. 1, 115; vol. 2, 744, 751, 758 (3d ed.).

absence, there may be a question whether you could obtain contribution without having the account taken over again in their presence. I am disposed to think that in a suit for contribution the Court would not direct the account to be taken over again, but only allow the defendant to show errors in it. The point, however, has not, so far as I am aware, ever been decided.[1]]

The cases on Consolid. Order VII. r. 2, all lead to the conclusion that the order does not apply to cases of general account, but only to suits for a liquidated sum, or for a single definite breach of trust. The cases in which the Court has proceeded in the absence of representatives of deceased trustees have all rested on special circumstances.

Mr. Malins, in reply. — In suits for an account it is not always necessary to make the representatives of a deceased trustee parties. *Masters* v. *Barnes*. (*a*) The terms of the General Order are clearly in my favour.

*THE LORD JUSTICE KNIGHT BRUCE. — The Lord Justice *178 is of opinion that the argument had better proceed, without prejudice to the question how at its close we shall deal with the objection as to parties. I am not quite satisfied, but am willing to concur in allowing the argument to proceed on that footing.

Mr. Bacon and *Mr. Rowcliffe*, for the appellant. — The scope of this deed was to authorize Gates to carry on his business and realize his assets under the supervision of the inspectors, but the deed does not vest the assets in them, and they cannot be liable to account on the footing of trustees. The present decree is in the most stringent form that could have been used if the property had all been vested in the inspectors upon trusts for immediately getting it in. The representatives of King ought to be parties, the Consolidated Order VII. r. 2, not applying to such a case. *Fussell* v. *Elwin*, (*b*) *Shipton* v. *Rawlins*, (*c*) *Fowler* v. *Reynal*. (*d*)

Mr. Malins and *Mr. Kay*, in support of the decree. — According to the scope of the deed, it was the duty of the inspectors to get in

(*a*) 2 Y. & C. C. C. 616.
(*b*) 7 Hare, 29.
(*c*) 4 Hare, 619.
(*d*) 2 De G. & Sm. 749.

[1] See Fletcher *v.* Green, 33 Beav. 515.

the property at the expiration of two years at the furthest if the trust had not then been completed, and it makes no difference in their duty or liability that the deed does not assign the property to them. Allen admits having received part of the estate; he therefore clearly must account; and the authorities, in the circumstances of the case, warrant an account on the footing on which it
* 179 has been directed. *Jones* v. *Foxall*, (*a*) * *Williams* v. *Powell*, (*b*) *Coope* v. *Carter*, (*c*) *Springett* v. *Dashwood*. (*d*)

Mr. Bacon, in reply.

Judgment reserved.

May 30.

The Lord Justice TURNER, after stating the leading facts, proceeded as follows: —

Upon the argument of the appeal it was first objected to the decree that the appellant was inspector merely and not trustee, and that, therefore, no such account as directed by the decree ought to have been directed against him; and various provisions of the deed were referred to as showing that the property was meant to be and was left under the management and control of Gates the debtor, and was not assigned to or vested in the inspectors; but without going fully into the provisions of the deed, many of which indicate that at least after the lapse of two years from its date the property was intended to be and was put entirely under the control and management of the trustees, it is, I think, sufficient to say that the property was by the deed clearly bound by a trust for the benefit of the creditors, and that the defendant Allen has so acted as that he must be taken to have assumed the trust, and must therefore be accountable as trustee. This ground of objection to the decree cannot therefore, as it seems to me, be maintained.

A much more serious objection to the decree was raised
* 180 upon the question as to the absence of parties * insisted upon by the answer. That the personal representative of Fielder King, and also James Rhodes, if shown to have come

(*a*) 15 Beav. 388.
(*b*) 15 Beav. 461.
(*c*) 2 De G., M. & G. 292.
(*d*) 2 Giff. 521.

within the jurisdiction before issue joined in the cause, would, according to the old practice of the Court, have been necessary parties to the suit, does not, as I apprehend, admit of any reasonable doubt; but it was contended on the part of the plaintiff that the course of the Court as to the necessary parties to a suit of this description was altered by the Order of the 26th August, 1841, now Order VII. r. 2, of the Consolidated Orders, and that by virtue of that order it was competent to the plaintiff to sue the defendant Allen alone as one of the inspectors, without the other inspectors being in any way represented in the suit. That order is as follows: "Where the plaintiff has a joint and several demand against several parties, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto, but the plaintiff may proceed against one or more of the persons severally liable."

Soon after the making of this order, it was held to apply to the case of a joint and several demand against trustees in respect of a breach of trust committed by them, and, therefore, that one of several trustees might alone be sued in respect of such breach of trust, and this decision, although apparently not altogether approved, seems to have been followed in many cases. To this extent, therefore, the course of the Court as to the necessary parties to suits of this description must, I think, be taken to have been altered; but most, if not all, the cases in which this effect has been given to the order, have been cases in which the sole question was, whether there had been a breach of trust or not, and in which, if the breach of trust was established, there was * a clear right to a decree against all the trustees to * 181 have the breach of trust set right. Those cases, therefore, have gone no further than to deprive a trustee sued in respect of a breach of trust of the assistance of his co-trustee in disproving the breach of trust. In none of them, so far as I can find, was there a case of general account superadded to the question of breach of trust. On the contrary, where this has been the case, it seems to have been uniformly held that the course of the Court was not altered by the General Order. It was so held by the Vice-Chancellor Sir JAMES WIGRAM in *Biggs* v. *Penn* (*a*) and *Shipton* v. *Rawlins*, (*b*) and these decisions were followed by the

(*a*) 4 Hare, 469. (*b*) 4 Hare, 619.

Lord Justice KNIGHT BRUCE as Vice-Chancellor in *Hall* v. *Austin*, (*a*) and by me as Vice-Chancellor in *Penny* v. *Penny*. (*b*) What fell from Lord LANGDALE in *Ling* v. *Colman* (*c*) tends also, as I think, to support this view of the effect of the order, which is the more important, as the application of the order to the case of trustees originally emanated from his Lordship. Upon the authorities, therefore, I think it must be considered as settled, that where the case is not one of breach of trust merely, but a general account is also sought, the General Order of the 26th August, 1841, does not dispense with the necessity of all the trustees being represented in the suit; and, I think, this is both the best and most convenient construction to be put upon the order, for the order does not in terms apply to cases of account, and it seems to point to demands which must result in liability to pay; but where a general account is to be taken, there may in the result be no such liability, and if suits be permitted
* 182 to be brought against one of several trustees for a * general account, there can be little doubt that the trustee so sued will immediately institute a further suit, bringing his co-trustees before the Court in order that they may be bound by the accounts to be taken, by which of course they could not be bound if taken in their absence. Whether there may be cases in which one of several trustees may alone be sued in respect of joint receipts, either by virtue of this General Order or even independently of it, it is not necessary for us to say. Possibly, one of several trustees may have so dealt with the joint receipts as to have rendered himself separately liable, or there may be other special circumstances which may warrant his being separately sued in respect of them; but I think that a special case must be made to maintain such a suit against one of several trustees. No such special case being made by this bill, and the bill being for a general account, I think that the proper order to have been made on the parts of this decree complained of by the appeal was, that the cause stand over, with liberty to amend by adding parties.

In this view of the case, it is unnecessary now to consider the questions raised by the appeal as to wilful default, and as to the account being taken with rests, and the directions for computing interest upon balances, and as to costs; but it may be right to say that, as at present advised, I do not see my way to so stringent a

(*a*) 2 Coll. 570. (*b*) 9 Hare, 39. (*c*) 10 Beav. 370.

decree, and I much doubt whether there is a sufficient case alleged and proved to warrant it, although there may be sufficient ground for directing some special inquiries as to the mode in which this estate has been dealt with. Upon the whole, I think that this decree must be varied by striking out the parts complained of by the appeal, and substituting for them a direction that, except as to the payment directed to be made by the defendant Gates, the cause stand over, with liberty to * amend by adding parties. * 183 It will be for the plaintiff to consider whether he will or will not make James Rhodes a party defendant to the amended bill.

THE LORD JUSTICE KNIGHT BRUCE. — Some of the circumstances of this case caused me to hesitate for a time as to the proper order to be made on this appeal. I have ultimately come to the same conclusion as the Lord Justice, and I assent to the order which he proposes.

MELLER *v.* STANLEY.

1864. April 22, 26. May 6, 9. Before the LORDS JUSTICES.

A testator, entitled to a freehold lease for three lives, was in the habit of insuring each of the lives, and renewing the lease at a fine when a life dropped. By his will he empowered his trustees to pay the premiums, to renew the lease, and to obtain other policies on the new lives on the plan then adopted. Subject as above, he directed his trustees to accumulate the income of his real and personal estate for twenty-one years, and at the end of that period to stand possessed of all the property and accumulations in trust for A. for life, remainder to her children successively in tail. A. had two children, the eldest of whom died an infant in A.'s lifetime, the other was still living. During A.'s life one of the lives dropped; the trustees renewed the lease and insured the new life, after doing which a large surplus of the moneys received on the policy remained in hand. A. having died, the representative of the deceased tenant in tail claimed this surplus and the subsisting policies.

Held, that a valid trust was created for keeping on foot the policies subsisting at the death of the testator, and by means of them renewing the lease and effecting fresh policies on the new lives, and that the personal estate was primarily liable to keep on foot the policies subsisting at the death of the testator, but not the future policies, and that subject to the above trust, the personal estate of the testator vested absolutely in the first tenant in tail, and that her

representative was entitled to the surplus of the moneys under the dropped policy, after providing for payment of the future premiums on the two remaining old policies, and paying the expenses of effecting the new policy, but was not entitled to a transfer of the two remaining old policies, for that the moneys to arise from them were primarily liable to the expenses of renewing the lease and obtaining fresh policies.

THIS was an appeal from an order of Vice-Chancellor STUART.

John Meller, the testator in this cause, was at the time of his death, which took place in 1829, entitled to a lease for three
* 184 lives, of the tithes of Wybunbury, and had * insured each of the lives in the sum of 5000*l.* He had been in the habit of keeping all the lives in the lease thus insured, and when a life dropped he applied the money receivable under the policy in renewing the lease and effecting a similar policy on the life of the new *cestui que vie.*

By his will, dated the 1st of May, 1829, the testator gave his residuary real and personal estate to trustees, and then gave the following direction: "And I authorize and empower my said trustees and the survivor of them, his heirs, executors, administrators, and assigns from time to time to pay the annual premiums on the policies of insurance for 5000*l.* each on three lives in my Wybunbury tithe lease, and to renew the said lease from time to time whenever it can be done on reasonable terms, and to obtain other policies on the life or lives to be therein named on the plan now adopted; and it is my will that none of the policies shall be sold." The testator then, subject as aforesaid, directed his trustees to accumulate the income of his residuary real and personal estates for the term of twenty-one years, and at the expiration of that time he gave, devised, and bequeathed all his real and personal estate with the accumulations thereof to Frederick Barker, for life, remainder to his first and other sons successively in tail, with remainder to Dora Barker for life, with remainder to her first and other sons successively in tail, with remainder to her first and other daughters successively in tail, with divers remainders over.

Frederick Barker died in 1854 without having had issue. In 1855, Dora Barker married Mr. Bull, and a settlement was executed on their marriage, extending in terms to all interest
* 185 in the testator's property which Mr. * Bull might acquire as next of kin of any child of the marriage.

There was issue of the marriage two daughters, Dora Emily,

who was born in 1856 and died in 1858, and Annie Sophia, born in 1857, and still living.

In 1860, one of the lives in the lease dropped. The trustees received the moneys payable under the policy on that life, obtained a new lease with a fresh life inserted, and insured that life for 5000*l*. The moneys payable under the dropped policy had been increased by the addition of bonuses to a large amount, and after the renewal of the lease the trustees had a large surplus in hand.

In the same year, 1860, the period of accumulation ended, and Mrs. Bull from that time until her death on the 23d of December, 1862, received the whole income of the property after payment of the annual premiums on the policies.

After Mrs. Bull's death, Mr. Bull took out letters of administration to the estate of his deceased child Dora Emily Bull, and he and the trustees of his marriage settlement presented a petition asking for the transfer to the trustees of a considerable sum of consols in Court in the cause which represented the surplus of the moneys arising from the dropped policy, and also asking for an assignment to them of the three subsisting policies.

The petition was heard by Vice-Chancellor STUART, who was of opinion that the subsisting policies and the surplus of the dropped policy belonged to Annie Sophia Bull, as the first tenant in tail in possession, and therefore refused to make any order on the petition, but gave * the costs of all parties out of the estate, * 186 considering the question one proper to be submitted to the Court. The petitioners appealed.

Mr. Malins and *Mr. Chapman Barber*, for the appellants. — If there were an intention shown on the face of the will, that only a tenant in tail who came into possession should take the personal estate, the decision of the Vice-Chancellor would be right, but there is no pretence for saying that such an intention is shown on the will, and there is nothing to take the case out of the general rule, that what gives an estate tail in realty gives an absolute interest in personalty. *Cox* v. *Sutton* (*a*) shows the distinction. The accumulations pass, though not mentioned. *Harvey* v. *Cooke*, (*b*) *Gosling* v. *Gosling*. (*c*) The trust as to the policies came to an end as soon as there was a person absolutely entitled

(*a*) 2 Jur. (N. S.) 732, V. C. W.
(*b*) 4 Russ. 34.
(*c*) 1 De G., J. & S. 1.

to the personal estate. We are, therefore, entitled to the subsisting policies effected in the testator's life, and to the residue of the moneys from the dropped policy.

Mr. Bacon and *Mr. Cracknall*, for the surviving daughter. — The policies were given to the trustees in trust to keep them on foot and deal with them according to the mode adopted by the testator. The Vice-Chancellor, as we submit, rightly held this not to be a gift of the policies along with the personal estate, but a continuing trust making them follow the real estate; they, in fact, were turned into realty for the purposes of the will. When the first tenant in tail died there was no money; nothing became
* 187 payable under the policy until long after. The * infant could not have claimed the policy, for it was subject to a trust which had not determined.

[The Lord Justice Turner. — If the tenant in tail had been of age, could not she and her mother have called on the trustees to transfer it to them ?]

We submit that they could not, unless they had first disentailed the estate; that of course would have put an end to the trust. The petitioners cannot have any title to the new policy which was effected after the death of the first tenant in tail, and has been kept up at the expense of the present tenant in tail.

[*Mr. Malins.* — We do not claim it; we claim the other two, admitting that we are liable to repay the premiums which have been paid out of the income of the present tenant in tail.]

As to the other policies, they are subject to a trust to renew the lease, which is not objectionable on the ground of remoteness, being dependent on an estate tail. It is tantamount to a trust to invest in real estates to be settled.

Mr. Jessel, for a remainder-man.

Mr. Greene, for the trustees.

Mr. Malins, in reply. — The argument of the appellants cannot prevail unless the policies are held to be real estate, which cannot be.

Judgment reserved.

April 26.

THE LORD JUSTICE KNIGHT BRUCE. — In this case I retain the impression which I had at the conclusion of the argument, that the three policies * subsisting at the testator's death * 188 are to be considered as part of the personal estate of the testator bequeathed by him in terms which, if the subject-matter of the gift had been real estate, would have conferred on the deceased daughter of Mrs. Bull an estate tail in remainder. I am of opinion, therefore, that, subject to the preceding interest, she became absolutely entitled to that part of the personal estate, and that the fact of her death before she acquired an interest in possession is immaterial. Upon the determination of Mrs. Bull's life-interest, Mr. Bull, as the legal personal representative of his deceased daughter, became entitled in possession to this part of the personal estate, subject to the contract in his marriage settlement to settle any interest which he might so acquire. It appears to me, however, that there is a question requiring further argument and consideration, the question as to the validity and continuance of the trust for keeping up the policies out of the income of the estate and applying the moneys receivable under them in renewing the lease. On this point I, and I believe the Lord Justice also, shall be glad of the assistance of counsel.

THE LORD JUSTICE TURNER. — This is a very singular case. There is no doubt as to the general rule, that where real and personal estate are given together, the person who takes the first estate tail in the real estate takes an absolute interest in the personalty, subject to the prior interests; and I do not think that this will contains any thing to take the case out of the general rule. The moneys to be received under the policies are not impressed with a trust for investing the whole of them in real estate, nor is the will so framed as to provide that the personal property shall not vest absolutely in a tenant in tail who dies under twenty-one. * But there remains this further question. Whatever * 189

the daughter took as personal estate she took as residue, and it was therefore subject to all charges imposed on the personal estate by the will. It may therefore be, that by virtue of the special directions of the will there is still a subsisting trust to keep the policies on foot and to renew the lease by means of the moneys received under them; and if so, the title of the representative of the deceased daughter will to some extent be prevented from taking present effect. This point has not been so fully argued as I could wish, and I agree with my learned brother in desiring to have it further discussed.

May 6.

Mr. Malins and *Mr. Chapman Barber*, for the appellants. — There is no direct trust to renew the lease, a power only is given to the trustees which they were not bound to exercise, and the existing policies cannot, therefore, be considered as saddled with any trust. If there was a trust for renewal, we submit that it subsisted only during the twenty-one years of accumulation, and has now determined. If the trust were general it would be void for remoteness, the existing policies, therefore, are free. In any event, no further trust is impressed upon any policy than that of a single renewal and of the effecting of a new policy; the dropped policy, therefore, has fulfilled its trust, and the surplus moneys arising from it form part of the general residue of the personal estate and belong to the appellants. *Bassil* v. *Lister*. (*a*)

Mr. Bacon and *Mr. Cracknall*, for the surviving daughter. — There is a valid trust to keep up the insurances. It

* 190 * cannot be void for remoteness, since it would be determined by barring the entail in the realty.

Mr. Jessel, for a remainder-man. — I contend that there is a valid trust for keeping up the subsisting policies and renewing the lease on the dropping of the two older lives. The trust is not void for remoteness, it amounts to a purchase of life leaseholds for the benefit of the persons entitled under the ordinary limitations of a settlement of real estate. Neither is it obnoxious to the provisions of the Thellusson Act, being similar to the usual direction for the

(*a*) 9 Hare, 177.

application of rents during the minority of a tenant in tail by purchase.

Mr. Malins, in reply. — If the trust be held to be subsisting, the premiums ought to be paid *pro ratâ* out of real and personal estate, the realty and personalty being given in one mass.

Judgment reserved.

May 9.

THE LORD JUSTICE TURNER. — In this case we have already decided that the appellants are entitled to the residue of the testator's personal estate, and that the policy moneys, which form one of the subjects of this petition, are part of that residue. The question which now remains to be decided, and which has been the subject of further argument before us, is, whether these policy moneys, as part of the residue of the testator's personal estate, are chargeable to any, and if any, to what extent, under the provisions contained in the will with reference to the renewal of the Wybunbury tithe lease. The general dispositions of the will and the facts of the case have been so recently under consideration, * that it is unnecessary to detail them. It is sufficient * 191 to state the particular clause of the will on which the question now to be decided more immediately depends. [His Lordship read the clause set out above.]

It was first argued on the part of the appellants, that this clause merely gave a power to the trustees, and created no trust which they were bound to fulfil; but although the words of the clause are words importing power merely, I think it clear that the power imported by them is one which the trustees were bound to exercise, and, therefore, that there was a trust created by them. The case of *Brown* v. *Higgs* (*a*) contains much which, as it seems to me, has an important bearing on this point.

There being then a trust thus created, it is to be considered what that trust is, and there are two parts of it. First, a trust for the payment of the premiums on the three existing policies; and secondly, a trust for the renewal of the lease, if in the judgment of the trustees it can be renewed on reasonable terms, and for

(*a*) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.

obtaining further policies. If these parts of the trust could be altogether separated the one from the other, there could not, as it seems, be any doubt that the appellants would be entitled to the whole of the fund in question on this petition. They could not be bound to keep up policies which, in that case, would be to be kept up for their own benefit only.

The first question then is, whether these two parts of the trust can be wholly separated, or are so connected together as that the one cannot take effect unless the other can take effect also;
* 192 and I think that they must * be taken in connection the one with the other. The plain intent of the will appears to me to be, that the existing policies were to be kept up for the purpose of renewing the lease. Although, however, the trust must thus be taken as one connected trust, there is not, so far as I can see, any ground upon which it could, as against an absolute owner of the personal estate, be insisted that the policies should be kept up at the expense of the personal estate if the lease could not be renewed, either from the circumstances of the case, or from any invalidity in the trust created for the renewal of it.

Now, so far as the circumstances of the case are concerned, it certainly does not yet appear that the lease may not be capable of renewal, and it is only necessary, therefore, to consider whether the trust for renewal is valid. It was said, on the part of the appellants, that this trust was void for remoteness; but the argument was not pressed to the extent that it was void as to the renewals on the dropping of the lives which were in existence at the death of the testator. I am not altogether satisfied, however, that the trust could be held valid as to some renewals and invalid as to others, although, beyond what I have said, I do not mean to give any opinion upon that point. In my view of the case it is not necessary to do so, for I think that the trust, assuming it to extend to all renewals, is nevertheless valid, and I think so for this reason: The trust is for the benefit of the devisees of the estate; and the limitations of the estate being valid, there would necessarily be a person who, within the period allowed by law, would have the absolute command over the estate, and by consequence over the trust. The trust for renewal then being valid, I can see nothing to invalidate the first part of the entire
* 193 trust, — the trust to keep up the * policies which were existing at the death of the testator; and two of those policies

being still in force, I think that a competent part of the fund which has arisen from the dropped policy must be retained in Court to answer the premiums on those two policies. I think, also, that the respondent is entitled to be repaid out of this fund the amount paid for obtaining the new policy upon the life which has dropped, including the first year's premium; but beyond this, I think that the fund belongs to the appellant, for the trust for the payment of premiums does not appear to me to extend to future policies, and although the trust for renewal and for obtaining future policies goes further, this part of the trust is qualified by the words "on the plan now adopted," and, coupling these words with the limited terms of the trust for the payment of premiums, I think the intention of the testator must be taken to have been, that the premiums on the future policies were to be paid out of the rents. Looking, too, to the provisions for effecting new policies, I think the intention must be taken to have been, that each policy as effected was to provide the fund for obtaining a further policy.

The appellants, by their original petition, claimed an assignment of the two policies which were existing at the death of the testator and which have not yet dropped; and this claim, although not much insisted upon, was not, I think, wholly abandoned in the argument before us; but, in my opinion, the appellants are not entitled to the assignment thus claimed by them, for I think that upon the true construction of this will the money arising from each of these policies as it drops is primarily liable to the expenses of renewing the lease and obtaining a new policy. The point to which I drew attention during the argument, as to contribution between the real and * personal estate, seems to me to * 194 be settled by *Boughton* v. *Boughton* (*a*) and *Tench* v. *Cheese*, (*b*) on the authority of which cases I think the personal estate is in this case primarily liable.

THE LORD JUSTICE KNIGHT BRUCE. — In this singular cause, as to which I have felt considerable embarrassment, I am convinced that the conclusion at which the Lord Justice has arrived is the safest and the best, though the case appears to me one which presents only a choice of difficulties.

(*a*) 1 H. L. Cas. 406. (*b*) 6 De G., M. & G. 453.

HUNTER *v.* BELCHER.

1864. April 22, 23. Before the LORDS JUSTICES.

The plaintiffs, in 1855, engaged the defendant as their traveller, to obtain orders and collect moneys, at a salary, the plaintiffs paying all travelling expenses. After each journey the defendant rendered an account and paid over the balance appearing to be due from him. The travelling expenses were charged in the accounts as so many days' travelling expenses, without giving any particulars. No objection was made to the accounts, and they were entered in the plaintiffs' books. This went on till April, 1861, when the defendant gave the plaintiffs six months' notice of his intention to leave their service. The plaintiffs, in July, 1861, gave him notice to keep a detailed account of his travelling expenses, but, notwithstanding this, his subsequent accounts were prepared on the same footing as the former ones, and were dealt with in the same way down to October, 1861, when he left the plaintiffs' service. The defendant having sent in a claim for salary, the plaintiffs served him with a counter claim, which however did not raise any questions as to his accounts. *Held*, that a bill by the plaintiffs against the defendant for an account could not be maintained.[1]

Per the Lord Justice TURNER: Where accounts have been rendered, the balances appearing due upon them paid, and the accounts entered in the books of the persons to whom they have been delivered, and a subsequent account has been rendered by those persons, raising no question as to the accounts which have been delivered, those accounts must be treated as settled.[2]

Per the Lord Justice TURNER: From the course of dealing between the parties, an agreement that the travelling expenses should be charged in a gross sum, without giving particulars, was to be implied, which agreement the plaintiffs could not determine by their notice of July, 1861.

THIS was an appeal from a decree of Vice-Chancellor KINDERSLEY.

* 195 *The bill was filed by manufacturers at Sheffield against one of their travellers, and it prayed that an account might be taken of all sums of money received by the defendant, or which were properly due and payable by him to the plaintiffs for damages or otherwise in respect of the matters mentioned in the bill, and of all moneys paid by the plaintiffs to the defendant in respect of

[1] See 1 Dan. Ch. Pr. (4th Am. ed.) 551, and note (3); Smith *v.* Leveaux, *ante*, 1 and note (1); Kerr Inj. 57 *et seq.*

[2] See 1 Dan. Ch. Pr. (4th Am. ed.) 665, and note (5), 666; 1 Story Eq. Jur. §§ 526, 527, 528; Kerr Inj. 61, 62; Coleman *v.* Mellersh, 2 Mac. & G. 309, and note (1).

salary, travelling expenses, or otherwise, and an account of moneys payable by the plaintiffs to the defendant for salary, travelling expenses, or otherwise, and that the defendant might be ordered to pay to the plaintiffs what should be found due from him, the plaintiffs offering to pay what, if any thing, should be found due from them. The bill also asked for an injunction to restrain the defendant from proceeding at law for his salary.

The defendant had entered the service of the plaintiffs as commercial traveller and clerk in the month of April, 1851, and he continued in their service in those capacities down to the 16th of October, 1861. The terms on which the defendant originally entered the service of the plaintiffs did not distinctly appear further than that he was to have a salary of 120*l.* a year, but on the 11th of October, 1855, an agreement was come to between the plaintiffs and the defendant, of which the following were the material terms: —

"The said M. Hunter & Son hereby agree to engage the said W. J. Belcher as clerk and traveller for them for the term of three years and a half from the date hereof on the following terms: The salary to be after the rate of 120*l.* per annum for the first half year, and 200*l.* per annum during the remaining three years. The said W. J. Belcher to be engaged in travelling for the said M. Hunter & Son as their commercial traveller in Ireland or elsewhere not exceeding six months out of * every * 196 twelve months, and to employ himself in the warehouse of the firm as clerk during the remaining time in the same manner as now, — all travelling expenses to be paid by the said M. Hunter & Son. And the said W. J. Belcher hereby agrees to engage himself to the said M. Hunter & Son on the terms and for the period aforesaid. And it is mutually agreed, that notwithstanding the expiration of the said term of three years and a half, this agreement and the said service shall continue until one of the said parties hereto shall have given to the other six calendar months' notice in writing of his or their intention to determine the same."

From the time of the defendant's entering the plaintiffs' service he annually made several journeys, principally, as it appeared, in Ireland, on the plaintiffs' account, for the purpose of obtaining orders to be executed by them and collecting moneys due to them

from their customers, and in the course of these journeys he, out of the moneys which he collected from time to time, made remittances to the plaintiffs and payments on their behalf. On his return from each of these journeys the defendant rendered to the cashier of the plaintiffs a detailed account of the moneys which he had thus received and paid, and in each of these accounts the defendant charged his expenses in one gross sum as so many days' expenses according to the number of days he had been engaged on the journey. On each of these accounts being rendered the defendant paid the balance appearing by it to be due from him, after deducting what for the time being was due to him for his salary, and all the accounts thus rendered were entered by the plaintiffs' cashier in a book of the plaintiffs called "The Journey Book." At the end of 1860 the defendant became unwell and was for some time unable to travel, and he did not travel again for the plaintiffs until April, 1861.

* 197 * On the 16th April, 1861, the defendant, acting upon the provision for that purpose contained in the agreement of the 11th of October, 1855, gave notice to the plaintiffs of his intention to leave their service on the 16th of October then next, and on the same 16th April, 1861, the plaintiffs wrote to the defendant a letter, in which, after referring to and explaining a notice which they had given to him on the 9th of April not to draw money on journeys, but if he wanted money to draw an order upon them, they expressed themselves as follows: —

"In writing this we think it only proper to make this explanation, which should have been done at the time, but as you know us so well you must have known it was not intended to cast any imputation, and no man of proper feeling would have thought so one moment. We never asked you for security; you could have control over all. You say you have faithfully kept your accounts, your travelling expenses we have never questioned, but took the mere statement that you had spent all the money you charged properly. There is one item, at least, which will require full explanation, that is, the item of expenses of your return to Sheffield from Dublin last year on your own business; as we know you keep very accurate accounts as to your own expenses, it will be very easy to show it correct. We mention this to give you some idea of what we may want if we have reason to think you are not

doing your duty; we want nothing at your hands but during the time you are receiving our money to do what you ought; that is, to do your best, the same as if you was going to continue in our service, and remember it is you who have given the notice. We should never have done it, nor would it have made any difference as to your only being able to work half the day, though your illness was caused by your own misconduct in stopping out late at night, — and as sure as you are born will return again, — and you have done your duty * to us in attention to business, — of * 198 this we never complained."

Notwithstanding the notice above mentioned to have been given by the defendant, he continued to make journeys on account of the plaintiffs down to the month of October, 1861, and in the course of one of these journeys, on the 4th of July, 1861, the plaintiffs wrote to the defendant as follows: —

"We shall be obliged if you will keep a correct account of your journey expenses, stating the items of railway and coach fares, hotel bills, &c., such an account as you can refer to, we want every item above mentioned separate, and with date. If you require any money you can pass an order upon us through your bank, if not unreasonable it will be paid, but without prejudice to your accounts."

The defendant, however, on his return from these journeys rendered his accounts as before, charging his expenses in the gross, and these accounts were dealt with as the previous accounts had been.

On the 16th of October, 1861, the defendant left the plaintiffs' service, and on the 17th October he entered the service as commercial traveller of some rival manufacturers at Sheffield, with whom he had previously been negotiating for employment. On leaving the plaintiffs' service on the 16th of October, 1861, the defendant rendered an account to the plaintiffs, in which he claimed 50*l.* 16*s.* 9*d.* to be due to him in respect of salary, but the plaintiffs then rendered a counter account, in which they claimed 14*l.* 11*s.* 2*d.* to be due to them from the defendant. This counter account contained no claim, and no reservation of any claim against

* 199 the defendant * in respect of the gross sums charged by him for expenses in the accounts which he had rendered.

On the 28th November, 1861, the defendant brought an action against the plaintiffs in the County Court of Yorkshire for 50*l.*, part of the sum of 50*l.* 16*s.* 9*d.* claimed to be due to him for salary, and the bill in this cause was filed on the 16th December, 1861.

Vice-Chancellor KINDERSLEY, before whom the cause was heard, made the following decree: —

"This Court doth order that the following account be taken, — an account of all moneys which, since the 11th October, 1855, were received by the defendant for or on account of the plaintiffs, or paid by them to him, and of all moneys which since that time became due from the defendant to the plaintiffs, for goods supplied to the said defendant, and of all moneys which since the said 11th October were remitted or paid by the defendant to or on account of the plaintiffs, or properly expended by him for travelling expenses as the commercial traveller or agent of the plaintiffs, and of all moneys which became due from the plaintiffs to the defendant for salary, and in taking such account the defendant is to be credited with all sums of money which shall appear in any account rendered by him to the plaintiffs more than six months prior to the filing of the plaintiffs' bill in this suit to have been remitted or paid by him to the plaintiffs themselves, or either of them, or to their cashier or book-keeper, and which were not disputed or questioned by the plaintiffs within six months next after the time when such account was rendered; and with respect to such travelling expenses it is ordered that the sums charged by the defendant for the same in any account rendered by him to the plaintiffs prior to the 1st July, 1861, be taken to be conclusive as to the amount of

* 200 such travelling * expenses respectively for any journey prior to the 30th June, 1861; and it is ordered that so much of the plaintiffs' bill as seeks to make the defendant liable for damages in respect of any alleged misconduct or breach of duty on his part do stand dismissed with costs; and it is ordered that the injunction awarded pursuant to the said order, dated the 16th January, 1862, be continued: reserve further consideration and the rest of the costs of the suit."

The plaintiffs appealed from the whole decree, except so much of it as continued the injunction.

Mr. Daniel, *Mr. Cole*, and *Mr. George Lake Russell*, for the appellants. — We submit that the decree is erroneous in directing all the charges for travelling expenses to be allowed which were contained in any account rendered before the 1st of July, 1861. At all events such a direction cannot be supported as to the journeys in the year 1861. It is the duty of an agent to keep a proper account, and if there is no special agreement for payment of a lump sum, he is bound to show what he has spent in travelling expenses. The whole account ought to be treated as open. *Stainton* v. *Carron Company*. (*a*) There is no authority for treating accounts rendered as conclusive with respect to all items not questioned within six months.

Mr. Baily and *Mr. Cabell*, for the defendant. — The whole case is open to the respondent, and we ask that the bill may be dismissed on the ground that there is no case for an account in a Court of Equity. The nature of the defendant's employment was rather that of a servant than of an agent. His business was to travel * for the purpose of obtaining orders to be executed * 201 by his employers, and of afterwards collecting the moneys due in respect of them. The employers, therefore, always knew the amount that was outstanding; and there is not the same necessity for discovery as in the ordinary case of an agent. Then accounts were rendered, and not objected to; the balances appearing due upon them were paid, and the accounts themselves entered in the plaintiffs' books. The accounts, therefore, were settled. As regards the items of travelling expenses, the course of dealing proves a contract that they should be charged in gross without an account of particulars, and the plaintiffs had no power in July, 1861, to alter this agreement by requiring an account of particulars.

Mr. Daniel, in reply. — There is nothing to show that any accounts were settled between the parties. An agreement to pay travelling expenses cannot be held to entitle a traveller to charge

(*a*) 24 Beav. 346, 352.

in a lump sum what he pleases, so as to preclude all investigation.

Judgment reserved.

May 7.

The Lord Justice TURNER, after stating the facts of the case, proceeded as follows: —

The appeal is from the whole decree, except so much of it as continues the injunction. The whole case, therefore, is, in substance, opened by the appeal, and the whole case being thus open, it has been contended, on the part of the defendant, that the bill ought to have been dismissed.

The case appears to me to stand thus: It consists of two
* 202 parts; the case as to salary, and the case as to the * accounts.

So far as the case as to salary is concerned, I can see no ground whatever for the bill independently of the case as to the accounts. The question whether the defendant is or is not entitled to the salary claimed by him was said, in the course of the argument, to depend upon the point, whether his salary was payable during an illness, which he had whilst in the plaintiffs' service; but whether it depends on this point or not, the right to the salary must, as it seems to me, be a dry legal question, with which this Court can have no concern, unless by reason of its connection with the accounts. The right of the plaintiffs to maintain this bill must, therefore, as I think, depend upon their right to the accounts prayed for by it. These accounts may be considered in two points of view: first, as relating to the receipts and payments of the defendant on account of the plaintiffs; and secondly, as relating to the expenses incurred by the defendant in his journeys. As to the first point of view, these accounts must, of course, be due, unless they are to be considered as having been settled; in which case, there being no fraud and no error alleged and proved, they cannot be opened.[1] As to this part of the case, therefore, the question is, whether the accounts ought to be considered as settled, and I am of opinion that they ought to be so considered. Accounts rendered, although not objected to, may not of themselves be entitled to be considered as settled accounts, although, under special cir-

[1] Kerr Inj. 62.

cumstances, they may, as I conceive, be entitled to be so considered; but where, as in the present case, not only have the accounts been rendered, but the balances appearing to be due upon them have been paid, and the accounts rendered have been entered in the books of the persons to whom they were rendered, and not only so, but a subsequent account has been rendered by those persons, which raises no question as to the accounts which have been * rendered, I cannot doubt that the accounts so ren- * 203 dered ought to be taken to be settled. It may be said, however, that although this may be the case as to the items of receipt and payment, it ought not to be considered to be so as to the expenses charged by the defendant, of which an account was required to be kept by the letter of the 4th of July, 1861, and that this part of the account being open, the rest of it must be open also. I am by no means satisfied, however, that if it was necessary to decide this point, it ought to be decided in favour of the plaintiffs. It was quite competent to the plaintiffs, if they thought proper, to waive the account of expenses required by the letter of the 4th July, 1861, and I am very much disposed to think that, under the circumstances of this case, the account of these expenses ought to be held to have been waived; but I think it unnecessary for us to decide this point. The agreement of the 11th October, 1855, although it provides for the payment by the plaintiffs of the travelling expenses, prescribes no mode in which those expenses are to be ascertained; but before the date of that agreement, the accounts between these parties had been settled upon the footing of the expenses being charged in the manner which I have stated, and after the date of that agreement, they continued to be so settled down to July, 1861. From these facts it is, I think, to be implied that there was a contract between these parties, that the expenses were to be charged in the manner above mentioned; and I do not think it was competent to the plaintiffs to determine this implied contract by their notice of the 4th July, 1861. Upon the whole, therefore, my opinion is, that this bill ought to have been wholly dismissed. I entirely agree with the Vice-Chancellor, that it has been properly dismissed with costs, so far as it has been so dismissed, and, under the circumstances of the case, I think that justice will be * done by dismissing the rest of it with- * 204 out costs; but, I think, the plaintiffs must pay the costs of the appeal.

THE LORD JUSTICE KNIGHT BRUCE. — In this case the relation, rather that of masters and servant than that of principals and agent, which existed between the plaintiffs and the defendant and the manner and habit of proceeding between them with respect to money matters, appear to me, in conjunction with the other circumstances proved by the evidence, to establish as a fact, that at the time of the commencement of the present suit there was not in existence any open or unsettled account between them, in any sense in which the term "account" is used with reference to equitable jurisdiction. Possibly there was then a sum of money due from the plaintiffs to the defendant, or a sum of money due from him to them, but there was at that time, in my judgment, nothing to render necessary or proper a suit in equity. It appears to me that the bill was unnecessarily and improperly filed, and should be wholly dismissed, but expressly without prejudice to any question in the action pending in a County Court, or to any action that may be brought against or by the defendant.

Whatever my opinion may be as to the costs, of course no costs beyond those given by the Vice-Chancellor can be given here without the concurrence of my learned brother; but I think that the plaintiffs should at least pay the costs which the Vice-Chancellor has ordered them to pay.

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* 205 * PRYOR *v.* PRYOR.

1864. April 29. Before the LORDS JUSTICES.

Parents having a power of appointing an estate to all or any of their children appointed it absolutely to two of their sons, upon the understanding that the appointees should resettle the estate upon certain trusts for the benefit of all the children then living during their respective lives, and subject thereto for the benefit of the children of the sons. This resettlement was made by a contemporaneous deed. *Held*, that the transaction could not be supported by analogy to the common case of an appointment to a daughter in contemplation of her marriage, accompanied by a contemporaneous settlement of the appointed fund, but that the appointment was void in equity, as made upon a bargain for the benefit of persons not objects of the power.[1]

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[1] See Kerr F. & M. (1st Am. ed.) 270, 271; Cooper *v.* Cooper, L. R. 8 Eq. 312.

THIS was an appeal from a decision of Vice-Chancellor WOOD, holding an appointment to be invalid as having been made on a bargain for the benefit of persons, some of whom were not objects of the power.

The power of appointment was created by a settlement made in 1808, on the marriage of Vickris Pryor with Jane Ann Peacock. By this settlement, subject to life-interests in the husband and wife, certain real estate was limited to the use of all and every the children of the marriage, or of such one or more of them exclusive of the others or any other or others of them, in such parts, shares, and proportions, for such estates and interests, to take effect in possession at such ages or times, and charged or chargeable with such sum or sums of money, annual or in gross, and subject to such powers, provisos, remainders, and limitations over (such charges, powers, provisos, remainders, and limitations over being for the benefit of the said children or some or one of them) and in such manner in all respects as the husband and wife or the survivor of them should in manner therein mentioned appoint, and in default of appointment to the use of all the children as tenants in common in tail, with cross-remainders between them in tail.

* At the time of the appointment in question there were * 206 living seven children of the marriage; two had died, one without issue, the other leaving a daughter, Mrs. Hingeston; of the seven children, three were daughters, all of whom had married long before the appointment.

By an indenture dated the 18th of June, 1846, but which was shown not to have been executed till some time in June, 1847, Mr. and Mrs. Pryor, in exercise of their power, appointed the property to the use of Felix Pryor and Arthur Pryor, two of the sons, their heirs and assigns, "as joint tenants and not as tenants in common."

By an indenture dated the 19th of June, 1847, made between Felix Pryor and Arthur Pryor of the one part, and Robert Pryor and T. Dew of the other part, reciting the appointment, and reciting that Felix Pryor and Arthur Pryor, being respectively desirous of making some provision for their brothers and sisters out of the said hereditaments, and of settling and assuring the said hereditaments mentioned in the schedule to the now stating deed upon the trusts and for the purposes and with the powers

thereinafter mentioned respectively, had, for the purpose of carrying that desire into effect, agreed and determined to convey the property in manner thereinafter appearing, Felix Pryor and Arthur Pryor conveyed the property to Robert Pryor and Tomkyns Dew in fee upon trust to pay certain life annuities to their brothers and sisters, and subject thereto, upon trust for the four sons for their respective lives in equal shares as tenants in common, with remainder in favour of their children.

An inquiry having been directed as to the circumstances
* 207 in which those deeds were executed, a mass of * evidence was entered into, as to the admissibility of some of which there was much discussion, but the arguments on this head are not reported, as the Court expressed no opinion as to its admissibility. The result of the evidence clearly was, that the appointment was made to Felix Pryor and Arthur Pryor, in order that they might, and on the understanding and arrangement that they would, immediately afterwards resettle the property in the above-mentioned manner, the disposition of the property made by the resettlement being the scheme of the parents, and not proceeding from the appointees.

Vice-Chancellor Wood held that the appointment was void, and that the trustees of the deed of 1847 held the property upon trust for the persons entitled thereto under the original settlement in default of appointment.

Felix Pryor and Arthur Pryor and the infant children of Arthur Pryor appealed.

Sir H. M. Cairns and *Mr. Wickens*, for the infant appellants. — There was no doubt an intention on the part of the father and mother, that Felix and Arthur Pryor should make a provision for the other children and their issue. The Vice-Chancellor considered that as the appointment would not have been made but for an understanding to this effect, there was a bargain which vitiated the appointment. So there is a bargain in substance when parents execute a power in favor of a daughter, who, on the same day, executes a marriage settlement of the appointed share. The common sense of mankind will not follow the Court if it makes a distinction between the two cases, and the point will come before the Court again and again.

* *Mr. Giffard* and *Mr. Macnaghten*, for Felix Pryor and * 208 Arthur Pryor. — It is desirable to have a broad and intelligible rule as to what is the sort of bargain that will invalidate an appointment. The sound rule would be, that an appointment should be supported, where the parent who makes it gets no benefit by it, and the arrangement made is one evidently made *bonâ fide* with a view to the benefit of the family. The Court will not be astute to upset such appointments on the ground of previous communications and understanding. *Wade* v. *Payet*, (*a*) *Tucker* v. *Tucker*, (*b*) *Goldsmid* v. *Goldsmid*. (*c*) The cases, Sug. Pow., (*d*) show that with the concurrence of an object of the power a valid appointment may be made in favour of persons not objects of it; the transaction being treated as an appointment to the object, and a settlement of the appointed fund by him. Such cases raise the question of bargain in the strongest form, for in such cases no control over the fund is given to the object of the power. It is dangerous to upset honest transactions of this kind; if there had been a marriage on the faith of this appointment, that would not have supported it, if it be invalid as matters at present stand. It is a beneficial thing that the head of a family should have power to enter into arrangements of this kind, when made *bonâ fide* for the good of the family without his deriving any individual benefit from them.

Mr. Rolt and *Mr. Darby*, in support of the order appealed from. — The case is governed by the principles laid down in *Topham* v. *Duke of Portland*. (*e*) An appointment is * void if made in order to effectuate a purpose inconsistent * 209 with the object of the power; and the result is not varied by the fact that no communication is made to the appointee until after the execution of the power. There is no analogy between a case like the present, and that of an appointment to a daughter for the purpose of a cotemporaneous marriage settlement. There the appointment is upheld because the settlement is the mode of dealing with the appointed fund which is most beneficial to the appointee; and it would be a proper exercise of parental influence to induce

(*a*) 1 Bro. C. C. 364.
(*b*) 13 Price, 607.
(*c*) 2 Hare, 187, 196.
(*d*) Page 670 (8th ed.).
(*e*) 1 De G., J. & S. 517, affirmed in D. P., 10 Law T. N. S. 355 [11 H. L. Cas. 32].

the daughter to deal in the same way with her own absolute property. The purpose there is not to use the power for objects which it does not contemplate, but to secure the fund in the way most beneficial to the child. *Birley* v. *Birley*. (*a*)

Mr. Willcock, for Hingeston and wife.

Mr. Daniel, for other respondents. — The fact of the appointment being made to the two sons as joint tenants is *primâ facie* evidence of a bargain. If they had been intended to take beneficially, the appointment would have been to them as tenants in common.

Mr. Giffard, in reply. — A bargain for the benefit of the brothers and sisters is confessedly unobjectionable. As regards the issue, if the fund is tied up in a way more beneficial to the parents than the giving it to them absolutely, why should this be invalid? The principle is the same as that which is applied in the case of an appointment to a daughter and a cotemporaneous marriage settlement: something is done which is better for the daughter than paying the money to her absolutely, and therefore the appointment is supported, though made on a bargain.

* 210 * The Lord Justice Knight Bruce. — The donee of a limited power of appointment may well execute it in favour of an object of the power, though he believes and knows that the appointee will at once dispose of the property in favour of persons who are not objects of the power. But if, besides this belief and knowledge, there is a bargain between the appointor and appointee that the appointee shall make a disposition in favour of persons not objects of the power, and the just result of the evidence is, that the appointment would not have been made but for the bargain, then the appointment is bad. The question is, to which of these two classes of cases the present case belongs. I am of opinion that it is immaterial whether the evidence objected to is received or not received, for in this particular instance I am of opinion that nothing is required beyond the two deeds of June, 1847, cotemporaneous in substance and fact, though one of them

(*a*) 25 Beav. 299.

bears date in 1846. The first deed is a deed appointing to two objects of the power as joint tenants (not as tenants in common) in fee. The second deed is a settlement containing this recital: "And the said Felix Pryor and Arthur Pryor being respectively desirous of making some provision for their said brothers and sisters out of the said hereditaments, and also of settling and assuring the said hereditaments described or mentioned in the said schedule to these presents upon the trusts and for the purposes and with the powers hereinafter mentioned respectively, they for the sake of carrying their said desire into effect," &c. After which the property is conveyed to a certain extent for the benefit of the brothers and sisters who are objects of the power, and partly for the benefit of persons of a lower generation who are not objects of the power. The first question is, whether it is possible for any reasonable person to be persuaded as a matter of fact that the limitations
* to the brothers and sisters were not a matter of bargain * 211
between the appointees and the donees of the power, —
whether it is possible to believe that the parents would have made the appointment but for that bargain. That standing alone would, I agree, be immaterial; a bargain for the benefit of persons who were objects of the power would not invalidate the appointment; but it is the association of the brothers and sisters with the grandchildren that proves the true intent of the donees of the power; and, as it appears to me a necessary inference of fact that the limitations in favour of the brothers and sisters were matter of bargain, so I think that the limitations in favour of grandchildren, which formed part of the same transaction, must also be taken to have been matter of bargain. I think that the two sets of limitations are associated together; that one is not independent of the other, but that they are parts of one entire design, which is in violation of the objects of the original settlement: a design which might be, and I believe was in this case, carried into effect by well-meaning persons, but which is contrary to law. I think that the Vice-Chancellor's conclusion is clearly right, whether the disputed evidence be admitted or not.

THE LORD JUSTICE TURNER. — I also agree with the conclusion of the Vice-Chancellor. I think that, apart from the disputed evidence, this was clearly a deliberate attempt to go beyond the limits of the power. It has been attempted to support this trans-

action by analogy to the case of an appointment made to a daughter on the eve of her marriage, and a cotemporaneous settlement by her of the appointed fund on herself and her husband and the issue of the marriage. I cannot but suspect such an argument for this reason, that the course of making an appointment to a * 212 * daughter on her marriage, which appointment is followed by her making a settlement, has been pursued for a century, but I never, until now, heard of an attempt being made to draw from that course of practice any general rule applicable to such a case as the present. I do not think that any analogy exists between the two cases. When an appointment is made to a son or daughter upon marriage, the question is, in what mode the son or daughter is to enjoy the appointed fund; whether, for instance, the daughter is to enjoy it by herself or by means of a settlement on herself and her husband and children. *Mr. Giffard* ingeniously attempted to apply the principle of those cases to the present case, and contended that here the brothers and sisters were to enjoy the fund by means of a settlement on themselves and their children. But here there was no occasion for this appointment being made at the time when it was made, and no occasion rendering it desirable that the enjoyment of the objects of the power should be modified, and we cannot, therefore, refer the transaction to a simple intention to benefit the objects of the power; we can refer it only to an intention to go beyond the power. I think, therefore, that this appeal cannot be supported.

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* 213 * GALLOWAY *v.* THE MAYOR, ALDERMEN, AND COMMONS OF THE CITY OF LONDON.[1]

1864. February 25, 26. April 26. Before the Lords Justices.

In 1862, an Act was passed authorizing the corporation of London to make a new street and buy certain lands (including the land of the plaintiff) and sell such parts of them as were not required to form part of the street. Shortly before the passing of this Act, the corporation agreed with a railway company, which had no power to take the plaintiff's land, that if the Act passed the company would purchase certain lands under the Act and sell for a certain

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[1] See S. C. *post*, 639; 3 De G., J. & S. 59; L. R. 1 H. L. 34.

price a specified part of them to the company, such part including the bulk of the plaintiff's land, only a small portion of which was required to be thrown into the new street. The corporation, after the passing of the Act, gave the plaintiff notice to take the whole of his land. *Held*, by the Lord Justice KNIGHT BRUCE, the Lord Justice TURNER inclining to the same opinion, that the corporation had, by entering into the above agreement, incapacitated themselves from forming a just judgment, as between them and the plaintiff, concerning the quantity of his land which they should require, and that an injunction ought to be granted to restrain them from proceeding on their notice.[1]

Per the Lord Justice TURNER: Whether an injunction ought not to be granted on the ground that the corporation were buying in order to sell to a body which had no capacity to take, *quære*?[2]

THIS was a motion on the part of the plaintiff for an injunction which had been refused by the Vice-Chancellor Sir WILLIAM PAGE WOOD. The injunction which was sought by the motion, according to the terms of the notice, was, to restrain the defendants from purchasing or taking, and from commencing or prosecuting any proceedings for valuing, any of the property of the plaintiff in the bill mentioned for the purpose of reselling the same to the Metropolitan Railway Company, or of carrying the agreement of the defendants with the railway company in the bill mentioned into effect, or for any purpose other than the formation of the new street authorized by the Metropolitan Meat and Poultry Market (Western Approach) Act, 1862, to be formed, or for any purpose not authorized by that Act, and from in any way misapplying the powers given to them by that Act so as to affect the plaintiff, and also to restrain the defendants from issuing any precept or commencing or prosecuting any proceeding under the powers of the said Act for the purpose of purchasing or taking any of the plaintiff's property in the bill mentioned, until the * por- *214

[1] This decision was reversed in the House of Lords on a distinction taken in favour of the action of an existing public body, such as the corporation of a city, which is intrusted by the legislature with the duty of making public improvements in its city; the powers thus intrusted to it for such a purpose will not be subject to so strict and restrictive construction. Galloway *v.* The Mayor, Aldermen, and Commons of the City of London, L. R. 1 H. L. 34; see Kerr Inj. 302, 303; 1 Joyce Inj. 719, 720; 2 ib. 995–997; Stockton & Darlington Railway Co. *v.* Brown, 9 H. L. Cas. 256; Richards *v.* Scarborough Market Co., 23 L. J. Ch. 110; Simpson *v.* South Staffordshire Water-Works Co., 34 L. J. Ch. 387; 2 Dan. Ch. Pr. (4th Am. ed.) 1650, note (2).

[2] See Wood *v.* Epsom & Leatherhead Railway Co., 8 C. B. N. S. 731; Vane *v.* Cockermouth & Darlington Railway Co., 13 W. R. 1015; Kerr Inj. 302.

tion thereof which they *bonâ fide* required to purchase or take for the purposes of the said Act should have been ascertained, and they should have given the plaintiff a proper notice of their intention to take the same and a proper opportunity of coming to an agreement with them as to the purchase-money or compensation to be paid in respect thereof.

By the London City Improvement Act, 1847, commonly described as "The Model Act," 10 & 11 Vict. c. 280, an Act which referred to improvements in a part of the city of London distinct from that which was affected by this suit, it was enacted by section 13 "that for the purposes of this Act it shall be lawful for the mayor, aldermen, and commons, and they are hereby authorized and empowered, to take and use or cause to be taken and used any lands, and pull down and remove or caused to be pulled down and removed any houses or buildings, which they may deem necessary or expedient to take, use, or pull down and remove for the purposes of this Act, at any time after the expiration of six months after the notice in writing from the mayor, aldermen, and commons, or their agent duly authorized, of the intention to take or use the same." By section 14, it was provided, "that no house or building, garden, planted walk, or yard belonging to a house or land shall be taken or made use of for the purposes of this Act, except such as are mentioned in the schedule hereunto annexed, without the consent in writing of the owner thereof being first had and obtained for that purpose."

For the purpose of recouping the defendants, the corporation, the expenses to be incurred by them in making the improvements provided for by the Act, power was given to them, by section 41,

* 215 to clear the ground and to sell the old materials; and, by section 46, to grant * building leases of the ground which they did not want for the purposes of the improvements, and which they might think proper to let, and power, by the 47th section, to sell the ground rents and reversions of the houses to be comprised in such leases.

By the Metropolitan Meat and Poultry Act, 1860, 23 & 24 Vict. c. 193, § 2, the powers of the Model Act were extended to that Act. By section 8, reciting that the plan of Smithfield Market and of the alterations and improvements had been deposited, it was provided, that certain parts of Smithfield Market might be appropriated for the purposes of a meat and poultry market. By

section 9, part of Smithfield was to be appropriated to the purposes of the Act; and by section 10, power was given to appropriate the under surface of the market for a railway station. By section 18, it was provided, that the market should not be opened, nor the railway station used, until a certain new street forming an approach from the west had been made. By section 32, the corporation were empowered to levy tolls in the market; and by section 37 it was enacted, that the tolls that should be levied and the rent that should be received from the railway company for the use of the underground station or terminus thereto should be applied, in the first place, in defraying the costs and expenses of collecting and receiving the tolls and rent, and in the next place in payment of the interest and principal of the moneys expended in the purchase or acquisition of land for the site of the said intended market and market-places.

By the Metropolitan Railway Act, 1862, 25 & 26 Vict. c. 58, provisions were made for laying out a new street from Victoria Street to an intended new meat and poultry market, and by section 13, it was enacted, that * the company and the cor- * 216 poration of London might enter into and carry into effect agreements with reference to the formation of the intended new street from Victoria Street to the intended Metropolitan Meat and Poultry Market, for powers to construct which application was made in the then present session by the corporation, and for the use of the under surface thereof, and with reference to the sale or lease of any lands to the company by the corporation of London, and the payments to be made in respect thereof.

By the Metropolitan Meat and Poultry Market (Western Approach) Act, 1862, 25 & 26 Vict. c. 174, it was recited, that the sum of 235,000*l.* authorized by the Act of 1860 to be raised "did not include the estimated cost of constructing the said road or street required by the said Act to be made previously to the opening of the market and the user of the railway station, which was added during the progress of the Act through Parliament, without any provision being made for defraying the costs thereof." Then, by section 3, the provisions of the Act of 1860 as to the street were repealed, and another line of street substituted for it. By section 5, the powers of the Model Act were extended to this Act, and by section 14 it was enacted, that it should be lawful for the corporation "to appropriate the whole or any part of the under-

ground surface beneath the intended street for the purposes of the Metropolitan Railway Company, or any other railway or other company or persons, and to enter into any contract or agreement with any railway or other company or persons for all necessary excavations, buildings, erections, and works, and for the lease of the same at such rent and upon such terms and conditions as shall be mutually agreed upon." By section 16, power was given to borrow 115,000*l.* on the credit of the tolls and on the security of the property of * the corporation. By section 18, the moneys were to be applied in paying and discharging the necessary costs, charges, and expenses of making the intended street, and of otherwise carrying the purposes of the Act into complete effect; and that 115,000*l.* was to be paid off within seven years after the passing of the Act out of the proceeds of the sale of the superfluous lands, or otherwise, by the mayor, aldermen, and commons out of their own estates and property. Then, by section 20, it was enacted that it should "be lawful for the mayor, commonalty, and citizens from time to time to sell and dispose of all or any part of the lands purchased or acquired by them under the authority of this Act, and which shall not be laid into and form part of the street by this Act authorized to be made, either with or without having first demised and leased the same on building leases, and to convey the land so sold or disposed of, and the fee-simple thereof, free from all incumbrances, notwithstanding any moneys may be then charged upon all or any part of the same lands." Under the former Act, it will be observed that the corporation of London was, in the first place, to clear the ground, then to grant building leases, and then to sell the reversions. That restriction was taken off by the Act of 1862, and power was given to them to sell, whether they had granted leases or not.

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The Metropolitan Railway Act, 1862, received the royal assent on the 30th June, 1862. The Metropolitan Meat and Poultry Market (Western Approach) Act, 1862, received the royal assent on the 29th of July, 1862.

The property of the plaintiff which was sought to be protected by injunction was, as to the whole of it, included within the Metropolitan Meat and Poultry * Market (Western Approach) Act, 1862, so as to be capable of being purchased by the defendants under that Act; but it was not subject to the power of purchasing given to the Metropolitan Railway

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Company by their Act of 1862. It was subject to the powers of purchasing given to the company by a former Act of 1859, but those powers expired on the 8th of August, 1862. This property was thus situate: part of it was on the south side, but by far the greater part of it was on the north side of the street called West Street, running from Victoria Street towards the east; and the proposed new street was laid out so as to cross West Street at an angle, and to throw into the line of the street a small portion of the property on the south of West Street, and a somewhat larger portion of the property on the north of that street, but to leave some part of the property on the south, and a still greater part of it on the north, outside the line of the proposed new street.

On the 26th of June, 1862, four days before the passing of the Metropolitan Railway Act, 1862, and about five weeks before the passing of the Metropolitan Meat and Poultry Market (Western Approach) Act, 1862, an agreement in writing was entered into between the corporation of the one part, and the Metropolitan Railway Company of the other part. It contained the following recitals: "Whereas the corporation are promoting a bill now pending in Parliament, which is intituled 'A Bill to improve the Western Approach to the Metropolitan Meat and Poultry Market, and to authorize the raising of additional Money;' and whereas the plan hereunto annexed shows lands which it is proposed by the pending bill that the corporation should be authorized to take, and a proposed new street leading from Victoria Street towards Greenhill Rents, which it is proposed by the pending bill that the corporation * should be authorized to make, and * 219 which is hereinafter referred to as the intended street:" and it was thereby agreed as follows: —

Article 1. The corporation will use their utmost reasonable endeavours to procure that the pending bill shall pass into a law in the present session of Parliament.

2. If the pending bill be passed into a law, the following articles shall have effect.

3. The corporation, with the utmost practicable despatch, will purchase, and procure to be vested in themselves, so much of the lands shown on the annexed plan, and comprised within the red border thereon, as comprises the site of the intended street, and

the lands lying northward thereof, and also so much of the lands lying southward and south-eastward of the intended street (including the piece of land marked C. on the annexed plan) as is necessary for enabling the company to have the benefits of articles 5 and 6 and 7 respectively, and will clear off all the buildings and erections now standing thereon.

4. The corporation, with all reasonable despatch, will make the intended street in the direction thereof shown on the annexed plan, and of the clear width of sixty feet throughout. But before the corporation begin the making of the intended street, they will give to the company at least six calendar months' notice of the intention of the corporation to begin the making thereof.

5. The company, if they think proper, and before the corporation begin the making of the intended street, may excavate the ground on the northern side of the line A B drawn on the annexed plan as the centre line of the intended street, for the whole length of the intended street between Victoria Street and Greenhill's Rents, and may appropriate the basement thereof to their
* 220 own use, * so as they, at their own expense, make and maintain proper and sufficient arches, or other supports over the same, for carrying thereon the surface roadway there.

6. The company shall have the right to make and maintain and use their railway below the intended street and below the surface of the ground southward and south-eastwards thereof, and into the railway station to be made under the intended meat and poultry market-place in Smithfield; the railway to be so made in such a line as Mr. John Fowler, the company's engineer, shall within one calendar month after the day of the date of these presents lay down on the annexed plan, and which line shall be so laid down as that it shall not prevent the London, Chatham, and Dover Railway Company from having a convenient access by railway from their main line of railway into the intended railway station.

7. The company may excavate the ground between the northern side of the land shown on the annexed plan, and comprised within the red border thereon, and the intended railway station, for the purpose of making and maintaining their railway in accordance with article 6; and they will make and maintain their railway from the northern side of the intended street and thence into the intended street and thence into the intended railway station in accordance with article 6, and with substantial archings over the

same, proper and sufficient for supporting the street and carriage road, warehouses and buildings intended to be made by the corporation on the surface there.

8. The corporation with all reasonable despatch will make and will thenceforth maintain all proper and sufficient sewers and drains for draining the intended street and the lands lying northward thereof and comprised within the red border on the annexed plan.

9. All works to be executed by the corporation and * the * 221 company respectively under this agreement shall be executed to the satisfaction of the city architect and the company's engineer or their umpire.

10. The corporation with the utmost practicable despatch will give to the company possession of such parts of the lands shown on the annexed plan as the company require for enabling them to make the excavations and works provided for by articles 6 and 7.

11. The corporation with all reasonable despatch will convey to the company the whole of the land shown on the annexed plan and lying northward of the intended street, and comprised within the red border on the annexed plan, with the right to use, in accordance with article 5, the basement of the northern side of the intended street, and the right of making, maintaining, and using their railway in accordance with articles 6 and 7.

12. The consideration to be paid by the company to the corporation for the conveyance to be made in accordance with article 11 shall be 70,000*l.*, to be, at the option of the company, paid in cash or by debentures of the company, or partly in cash and partly in debentures of the company.

Then followed provisions as to the rate of interest on the debentures, and as to the interest to be paid by the company if they had possession before conveyance, and a provision that the debentures should be for sums of not less than 5000*l.* each, payable five years after the conveyance.

The lands which the corporation thus agreed to acquire and sell to the company included all that part of the plaintiff's property which lay to the north of the intended new street.

After the passing of the Metropolitan Meat and * Poultry * 222 (Western Approach) Act, 1862, the plaintiff, in the month of May, 1863, was served by direction of the corporation with a

notice intituled under that Act, stating the intention of the corporation to take property therein mentioned, being the whole of the above-mentioned property of the plaintiff, requiring possession to be delivered up in six months, and calling upon him to send in particulars of his claim.

The plaintiff appeared not to have been aware at first that there could be any question as to the right of the corporation to take the whole of his property, and some negotiations took place upon the subject of the purchase; but no arrangement having been come to, the company ultimately caused a precept to be issued for summoning a jury to assess the value of the property, and procured the 20th of February, 1864, to be appointed for that purpose. Thereupon the bill in this cause was filed against the corporation on the 6th of February, stating as above, and alleging that the greater part of the plaintiff's property was not wanted by the defendants for the purposes of their Act, and that their object in taking it was not to carry into effect those purposes, but only to enable them to fulfil their agreement with the railway company, and praying for an injunction as above mentioned, and for an inquiry to ascertain what part of the plaintiff's property the defendants *bonâ fide* intended to take for the purposes of their Act.

This injunction having been refused by Vice-Chancellor Wood, the motion was now renewed by way of appeal.

Mr. Rolt and *Mr. Bagshawe*, for the plaintiff. — We do not dispute the right of the corporation to take what is wanted for
* 223 the site of the new street, but we * contend that they have no right to take the whole of the plaintiff's land for the purpose of carrying into effect an arrangement with the railway company which was entered into before the passing of the Act which gave the corporation a right to take the land. The legislature has not given the company power under its own Act to take this property, and cannot have intended to give the corporation a power to sell to a body having no capacity to take. The corporation, in exercising the power of purchasing given by the Act of 1862, had a discretion to exercise. They have, in fact, delegated the exercise of this discretion to the railway company, and have entirely precluded themselves from exercising it. The legislature intended that the corporation should buy such land as in its judgment it should think expedient, and then sell, on the best terms it

could, such parts as were not wanted for the site of the new street. Instead of this, the corporation have sold at a fixed price before they have bought: thus running the manifest risk of getting for the property less than they have to give for it. They are using, for the purposes of one scheme, the powers given by the Act for the purposes of another scheme, and whereas their Act manifestly points at their clearing the land and then selling it, they have sold without having cleared it, or even purchased it.

Sir H. M. Cairns and *Mr. Swanston*, for the corporation. — The scope of the City Acts is, that the corporation should buy not only just so much land as would suffice for the works intended to be executed, but also such additional land as by its resale at a profit would pay the expenses of the undertakings. It is plain, therefore, that we are not limited to what is required for the street itself, and it is impossible to stop short of the conclusion that we are entitled to take the whole of the plaintiff's * land. There * 224 is a broad difference between railway Acts and Acts for improvements in streets. A railway company gets tolls and fares, the corporation gets nothing out of a new street, and therefore its powers of taking land are extended so that it may repay itself by reselling the frontage. Under the City Act, 2 & 3 Vict. c. 107, § 11, which is in the same terms as the clause *in pari materiâ* in the Model Act, Lord COTTENHAM, in *The University of Oxford* v. *Corporation of London*, (*a*) held that the corporation were not confined to taking what was wanted for the site of the street, but might take any lands in the schedule which they in their discretion thought fit. Having regard to the spirit and scope of the Acts, the agreement with the railway company was a right and proper one; the raising money by trading in land being one of the objects of the Act, the corporation were justified in obtaining beforehand a good customer. According to the principle of the Acts, the corporation was not bound to regulate its purchase by considering how much land was necessary for the street, but might consider how much land ought to be taken with a view to making the greatest profit by the resale of the superfluous parts. The Railway Act of 1862 clearly authorizes the company to buy from the corporation, so there is capacity to take.

(*a*) July, 1841; not reported.

Mr. Rolt, in reply. — The respondents do not meet the argument that the corporation are authorized to take this property only for the purposes mentioned in their Acts, and are taking it for another purpose. The corporation has an interest in the railway scheme, and is working for the benefit of the railway company without exercising that discretion which it is bound to exercise.

These lands being lands which the railway company has no
* 225 power to take, it has * no right to buy them, and the corporation cannot possibly be justified in buying for the purpose of selling to a body which has no capacity to take.

Judgment reserved.

April 26.

THE LORD JUSTICE KNIGHT BRUCE. — The present is an appeal not from a decree. The question is of granting or refusing an interlocutory injunction. And as to this, I think that the agreement between the defendants and the Metropolitan Railway Company, which is stated in paragraphs 15 and 16 of the bill in the cause, for the purchase by the latter from the former of surplus land to be acquired by the defendants from the plaintiff under the defendants' parliamentary powers, must be taken to have in effect incapacitated the defendants from forming a just judgment as between them and the plaintiff concerning the quantity of land which they should require the plaintiff to sell to them under those powers; and I consider that a fair judgment cannot be taken to be exercised by the defendants between them and the plaintiff, — that the defendants' course of proceeding has been biassed, unduly biassed, against the plaintiff and to his damage and injury, — that the agreement, howsoever intended, must be regarded, therefore, as an improper measure against the plaintiff, — that he is accordingly not bound by what has taken place, and that accordingly also he is entitled to an injunction to restrain the defendants from acting against him on the notice given to take his land dated the 30th of April, 1863, which is stated in the bill. In what I have said I have assumed that there is not any wider or other ground on which the plaintiff can claim an injunction, but on this point
* 226 I do not intimate any * opinion. The wording of the injunction will require particular attention.

The Lord Justice TURNER, after stating the terms of the notice of motion, proceeded as follows: —

The question whether this injunction ought to be granted depends mainly, if not wholly, on the provisions contained in several Acts of Parliament and in an agreement entered into between the defendants and the Metropolitan Railway Company. I have attentively considered all the Acts of Parliament which were mentioned in the course of the argument before us, but, in the view which I have taken of this case, there are several of them on which I do not think it necessary to comment. It will, in my view of the case, be sufficient for me to refer to the Act which in the course of the argument was called the Model Act, 10 & 11 Vict. c. 280; The Metropolitan Meat and Poultry Market Act, 1860, 23 & 24 Vict. c. 193; The Metropolitan Railway Act, 1862, 25 & 26 Vict. c. 58; and The Metropolitan Meat and Poultry Market (Western Approach) Act, 25 & 26 Vict. c. 174, and to some few only of the clauses in these Acts; but it may be right to observe that arguments of some weight, founded on other clauses of these Acts and upon some of the other Acts which were referred to in the argument, were adduced on the part of the plaintiff, and that reference was made on the part of the defendants to an Act of the 22 & 23 Vict. c. 97, by which power was given to the Metropolitan Railway Company to take the lands of the plaintiff as to which this injunction is asked. This power, however, expired on the 8th August, 1862, and it is obvious that at the time when the Acts of 1862 were passed it was practically of no avail. It is unnecessary, therefore, in my opinion, further to refer to it.

* His Lordship then, after stating the facts of the case in * 227
nearly the same terms as the statement given above, proceeded as follows: —

The position of the case, as I understand it, is this: the defendants, the corporation, have, under the Metropolitan Meat and Poultry Market (Western Approach) Act, 1862, the right to purchase the whole of the plaintiff's property, and they must also, as it seems to me, have the right to sell the property when purchased or acquired by them to some persons and under some circumstances. The 20th section of the last-mentioned Act must, I think, be held

to give them this power. But then what is the extent of this power? A power to sell, even though given by Parliament, cannot, as I apprehend, be construed to authorize an incapacitated person to buy, and unless, therefore, it can be shown, not merely that the corporation were empowered to sell, but also that the railway company were empowered to buy, I cannot at present see my way to holding that the corporation could sell to the railway company; but yet it is clear upon the evidence before us that it is for the purpose, and the sole purpose, of selling to the railway company that the corporation are endeavouring to purchase the whole of the plaintiff's property. I cannot but doubt whether they are entitled to do this, unless, indeed, it can be shown that the railway company are capacitated to buy from the corporation. Are they, then, so capacitated? It is true, no doubt, that, by their Act of 1862, power is given to them in very general terms to agree with the corporation for the sale of any lands by the corporation to them; but some limit must, of course, be put upon this power. We cannot suppose it to have been the intention of the legislature to vest in this railway company the power to purchase any lands whatever belonging to the City of London, lands, for instance, in dis-
* 228 tant counties, or * otherwise out of the range of the railway company's operations. What, then, is the limit to be put upon this power? I very much incline to think that it must be measured by the purposes of the Act by which the power is given, and the purposes of this Act, as I understand it, are the extension of the line of the railway to the Meat and Poultry Market, so as to afford a convenient approach to that market from the west. It was not, as I conceive, intended by this Act to vest in the railway company the power to acquire land for an additional or more extended station, the purpose for which, as I collect from the evidence, this property is in part intended to be applied. Where the legislature intends to give the power to acquire lands for those purposes, the intention is generally, if not universally, expressed in the Act. Nor was it, as I conceive, intended by this Act to vest in the railway company land to be afterwards sold by them as superfluous. I see no trace of any such purpose in the Act, or of any intention to benefit the railway company, otherwise than by the express provisions contained in it. It was argued, for the defendants, that they were the judges of the land which they would purchase; but if the construction of the Railway Company's Act be such as I have

suggested, this argument cannot avail them. They may be judges of what shall be done within the powers of their Act, but they cannot exceed their powers. The points to which I have thus adverted seem to me to be well deserving of consideration. It is not necessary now to give, nor do I mean to give, any final opinion on these points. It is sufficient to say that there is a question, and, in my opinion, a very serious question, upon them, proper to be discussed at the hearing of the cause; and upon this ground alone, I think, speaking with all possible respect to the Vice-Chancellor, the injunction prayed by this bill ought not to have been refused.

* But the case does not rest here: powers, such as those * 229 which are given to the corporation by this Act of Parliament, are at all times to be exercised *bonâ fide* and with judgment and discretion. In this particular case, this rule certainly ought not to be relaxed, for the corporation are in this case to some extent trustees for the public. The continuance of the market tolls depends upon the proceeds of the sales to be made by them. Now in what position have they placed themselves? They have agreed to sell to the railway company before they purchased, and even before they acquired the power to purchase. Can it then be said that they have exercised the judgment which they were bound to exercise, or even that they have ever been in a position to exercise that judgment, bound as they have been, and are, by the agreement into which they have entered? I cannot, to say the least, but feel doubt upon these points, and think that they ought to be reserved to the hearing. Again, therefore, speaking with all respect to the Vice-Chancellor, my opinion is, that upon this ground also the injunction asked by this notice of motion was due.

There were, as I have already said, other points argued before us, and I have only to add that, in disposing of the case upon the ground to which I have referred, I do not mean to prejudice the argument upon those points. They will be open at the hearing. As the case stands, I think there must be an injunction until the hearing or further order in the terms of the notice of motion, omitting only the parts of the notice which have reference to the purposes of the proposed sale.

* 230 *HILL *v.* THE SOUTH STAFFORDSHIRE RAILWAY COMPANY.

1864. April 21, 22.

An application to vacate the enrolment of a decree may be made either to the Lord Chancellor or the Lords Justices.[1]

A decree was passed by the registrar on the 7th of April. According to the usual course, at least one clear day elapses before the decree is given out to the parties as passed and entered, but in cases of urgency it may be bespoken for the following day. The plaintiff's solicitor having notice that the defendants intended to appeal, bespoke the decree for the following day, and at once enrolled it. On the 9th of April, a petition of appeal was presented. *Semble*, that the deviation from the ordinary course of proceeding in obtaining the decree before the usual time would alone have been a sufficient ground for vacating the enrolment.[2]

THIS was an application by the defendants, the South Staffordshire Railway Company, to vacate the enrolment of a decree.

The decree was pronounced on the 8th of March, 1864, and finally settled on the 7th of April, when it was given out by the registrar to his clerk to be passed.

In the mean time, about the 18th of March, an interview had taken place between Mr. Taylor, the managing clerk of the defendants' agents, and Mr. Thorpe, the country solicitor of the plaintiff, the account of which, given by Mr. Taylor, was as follows: —

"I met the said Mr. W. Thorpe at Fendall's Hotel, and the subject of an appeal was again mentioned, when the said Mr. W. Thorpe said to me, with reference to the said intended appeal, 'I am glad to hear it; the more grist to the mill; however you will find it of no use, for we shall beat you.' To the best of my remembrance and belief, those were the exact words uttered, and I am certain as to their effect."

Mr. Thorpe's account was as follows: "I do recollect the said A. H. Taylor calling at Fendall's Hotel to inquire for Mr.
* 231 Coulman, my clerk, * when he said, but quite in a joking tone and manner, 'It may be that the company will appeal,'

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1028.

[2] See 2 Dan. Ch. Pr. (4th Am. ed.) 1026, 1027.

to which I replied, also in a joking tone and manner, 'Surely after what has passed they will not expend any more money, but if they think they ought to bring a little more grist to our mill, be it so.' At the time such casual conversation took place, I had not the least reason to believe, nor did I believe, that the defendants seriously intended to appeal against the said decree. On such last-mentioned occasion I did not use the words, 'I am glad to hear it,' as stated in the said affidavit; on the contrary, if I had thought the said A. H. Taylor had spoken otherwise than as a joke, I should have expressed both surprise and regret."

Subsequently a conversation took place between Mr. Taylor and Mr. Coulman, the managing clerk of the plaintiff's country solicitor, as to which Mr. Taylor, in the 5th paragraph of an affidavit made by him, deposed as follows:—

"Shortly after the said 24th day of March, 1864, as I am informed and believe, the said Mr. W. Thorpe returned to Thorne near Doncaster, where he resides, and his place in London, for the purpose of attending on behalf of the plaintiff the passing of the said decree, was on or about the 2d of April taken by his managing clerk Mr. R. J. Coulman, who had previously to the date of the said decree been concerned in the management of the said suit on behalf of the plaintiff, and whom, as acting in that capacity, I had repeatedly met. The said Mr. Coulman on his arrival in London appeared to be and in fact clearly was, previously to any communication with me, fully aware of the defendants' intention to appeal against the said decree, and I perfectly remember speaking to him on the subject of the counsel to be brought in upon the said appeal, and that he *replied that they (meaning the plaintiff's advisers) would have to get some one in addition, most likely *Sir Hugh Cairns*, or words to that effect." * 232

Mr. Coulman deposed as follows as to the same interview:—

"In reference to the 5th paragraph of the affidavit of A. H. Taylor, I say that I had not previously heard of the company's intention of appealing previously to the same being named to me by the said Alfred Henry Taylor, and that when he did so state to me the company's intention of appealing, he said they should have the

Attorney-General in addition to *Mr. Malins*, *Mr. Speed*, and *Mr. Miller*, and in reply I said, 'Then I suppose we must have along with our counsel *Sir Hugh Cairns* to meet the Attorney-General,' or words to that effect, but I said, 'You must be joking, the company can never think of appealing against such a judgment, giving as it does the reasons so fully and clearly for every item allowed;' he then said the company would appeal before the Lords Justices and the House of Lords as well, and that what with the day account to be taken by the chief clerk it would be years before it would be finally closed, probably not in his and my time. I said, 'The greater the shame that a man having earned the money as the company knew Mr. Hill had done should be so harassed.' I believe the words quoted were the words actually used, but I say positively that I have correctly stated their purport and meaning. This conversation took place at Fendall's Hotel on the 6th of April, after attending the registrar to settle the draft of the said decree, but was only a friendly conversation, and certainly not intended to lead the defendants' solicitors to imagine, and they had no reason to imagine, and, as I believe, did not imagine, that we at all acquiesced in the appeal, in fact it was considered by me
*233 * to be a mere threat on the part of the said Alfred Henry Taylor. I had no authority whatever to name *Sir Hugh Cairns* or any other counsel, and such subject had never been mentioned to the plaintiff or considered by his advisers. I did not really believe the company intended to appeal before the said Alfred Henry Taylor showed me the copy draft petition."

"That on my naming *Sir Hugh Cairns*, the said Alfred Henry Taylor said, 'But you will have to give him a special fee,' and asked how Mr. Hill stood in a pecuniary point of view, to which I replied, that had he not been pretty well off the company would have hunted him down before this, which was clearly their intention, and I did not fear but that he would after all be able to see it out."

The decree, having on the 7th of April been given by the registrar to his clerk to be passed, as mentioned above, was given out to the plaintiff's agent duly entered on the following morning, and on the same morning the docket of enrolment was left with the clerk of records and writs for the signature of the Lord Chancellor, from which time, no *caveat* having been entered, the decree would be treated as enrolled, though it was not actually signed by the

Lord Chancellor till the 18th. Notice of enrolment was given to the defendants' solicitors on the 8th of April, and their petition of appeal was presented on the 9th. As to this part of the case Mr. Taylor deposed as follows: —

"I am informed and believe that it is the rule of the registrar's office that two days at the least shall elapse between the time when the registrar gives out a decree to his clerk to be entered in his private book before it is passed, and the entry thereof in the registrar's book by the entering clerk, so that no person can obtain or take * away the decree passed and entered before * 234 the second day from the giving out thereof for the purpose aforesaid, and I relied upon this rule being maintained in the present instance, and accordingly on, and not before, the morning of the 9th day of April, I presented the petition of appeal on behalf of the defendants against the said decree. Since presenting the said petition I have been for the first time informed that the only mode by which the plaintiff's solicitors could have been enabled to obtain or enrol the said decree on the 8th day of April must have been by a private and exceptional arrangement with the registrar's clerk; and I further say that, if such private and exceptional arrangement had not been made, but the usual practice of the office had been observed, the said petition of appeal would have been presented in time to prevent the enrolment of the said decree."

The plaintiff's agent deposed as follows: —

"Although it usually requires an interval of one clear day between the passing of a decree and the perfecting of the entry thereof, yet the practice of the registrar's office permits a solicitor to bespeak the entry of a decree or order for the following day, when the same will be given out by the entering clerk duly entered, if he is satisfied that there is actual reason for despatch. I deny that there was any private or exceptional arrangement, agreement, or understanding with the registrar's clerks or entering clerks or any or either of them; but I say that the said decree was obtained from the entering seat on the morning of the 8th inst., in consequence of a request made by me the day preceding to the entering clerk to have the same entered on the then following morning, for the purpose of enrolling it before the defendants presented any petition

of appeal, which they had threatened. I say that the same was regularly and duly obtained according to the course of the * 235 Court and * the practice prevailing in the registrar's office." He further deposed that he gave notice to the defendants' agents of the enrolment on the same day.

Mr. Taylor, in reply, deposed that, although notice of the enrolment was left at the office of the defendants' solicitors on the 8th of April, he was not informed of it until the evening of the 9th, after he had presented the petition of appeal. He stated that the references made to the appeal in conversation were such as to show clearly that the defendants were determined to appeal to the Lord Chancellor, and that the plaintiff's solicitors knew it, and he stated that the words and conduct of the plaintiff's advisers had led him to believe that they acquiesced in and assented to the appeal.

Upon the motion being opened, *Mr. Bacon*, for the plaintiff, took a preliminary objection, that the application ought to be made to the Lord Chancellor. 14 & 15 Vict. c. 83, § 5; *Attorney-General* v. *Corporation of Exeter*; (*a*) *Cooper* v. *Taylor*. (*b*)

Their Lordships overruled the objection.

Mr. Malins and *Mr. Speed*, in support of the application. — There has been undue despatch in obtaining the decree from the registrar's office earlier than in the ordinary course, and the plaintiff's solicitors have misled the defendants by leading them to suppose that there was no objection to an appeal.

On either ground, the enrolment ought to be vacated. * 236 *Stevens* v. *Guppy*, (*c*) *Enraght* * v. *Fitzgerald*, (*d*) *Anon.* (*e*) *Wickenden* v. *Rayson*, (*g*) *Barnes* v. *Wilson*, (*h*) *Balguy* v. *Chorley*, (*i*) *Wildman* v. *Lade*, (*k*) *Pearce* v. *Lindsay*, (*l*) *Whitaker* v. *Leach*. (*m*)

(*a*) 22 L. J. 418 (Ch.), L. J.
(*b*) 23 L. T. 263.
(*c*) T. & R. 178.
(*d*) 1 Dru. & War. 72.
(*e*) 1 Ves. 326.
(*g*) 1 Jur. (N. S.) 945.
(*h*) 1 R. & M. 486.
(*i*) 1 M. & K. 640.
(*k*) 4 De G. & J. 401.
(*l*) 4 De G. & J. 211.
(*m*) Smith's Ch. Pr. p. 474 (6th ed.).

Mr. Bacon and *Mr. Bovill*, for the plaintiff. — The defendants might have entered a *caveat*, and have no right to complain, because, they having omitted to do so, the plaintiff enrolled the decree with all practicable despatch. Nothing was said on the part of the plaintiff which could have the effect of misleading the defendants. *Ricketts* v. *Martin*. (*a*)

THE LORD JUSTICE KNIGHT BRUCE. — Vigilance, diligence, and activity on the part of solicitors are not to be despised; but good qualities may be exaggerated, and, considering what had passed between the gentlemen concerned for the opposite parties in the present case with reference to an appeal, I think that it would have been right for the plaintiff's advisers *festinavisse lentiùs*. The circumstances of the case appear to me to bring it within the authority of *Stevens* v. *Guppy*, which I am disposed to follow. It is unnecessary to say whether some of the remarks attributed to Lord HARDWICKE do not go too far; if they do not, they are strong authority in support of the present application. But, however that may be, the principles laid down by Lord ELDON govern this case, and the enrolment ought, in my judgment, to be vacated.

* THE LORD JUSTICE TURNER. — I also am of opinion that * 237 the enrolment ought to be vacated. I think it clear upon the evidence that the plaintiff's advisers knew throughout that the defendants intended to appeal against the decree, and did not intend to appeal in the first instance to the House of Lords. This, I think, distinctly appears, not only from the evidence on the part of the defendants, but also from that on the part of the plaintiff. [His Lordship here read part of Mr. Coulman's affidavit given above.] It further appears that the plaintiff's advisers used language which was calculated to lead the solicitors of the defendants to believe that the presentation of a petition of appeal was assented to. It is very satisfactory when a case can be disposed of upon the evidence adduced by the party against whom the decision is made, and here I think that one of the affidavits filed on behalf of the plaintiff states circumstances which bring the case within the authority of *Stevens* v. *Guppy*. Mr. Thorpe states, that, upon Mr. Taylor's mentioning to him the subject of

(*a*) 2 De G., F. & J. 163.

an appeal, he said, "If they (the company) think they ought to bring a little more grist to our mill, be it so." How could the defendants' advisers conceive that the plaintiff's solicitors would take steps to prevent an appeal after having thus signified their assent to it.

It is also admitted by the affidavit of the plaintiff's agent that it is the usual course to allow a clear day to elapse between the passing of a decree and its being entered and delivered out. In the present case the decree was entered and delivered out on the day following that on which it was passed, and it was enrolled on the same day. I am not sure that this departure from the usual practice would not by itself be a sufficient ground for vacating the enrolment.

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* 238 *DAVIES *v.* OTTY.

1864. June 3. Before the LORDS JUSTICES.

The plaintiff, by deed reciting a contract for sale by him of certain lands and shares to the defendant, conveyed the land to the defendant in consideration of 20*l.* therein expressed to be paid and of a covenant by the defendant to indemnify the plaintiff against all liability in respect of the shares. The plaintiff afterwards filed his bill, alleging that the deed was executed merely for the purpose of enabling the defendant to manage the property for the plaintiff during his absence from the neighbourhood, and was not intended to give the defendant any beneficial interest; that the 20*l.* had never been paid, and that the plaintiff had subsequently paid calls in respect of the shares, and praying for a reconveyance, or if the Court should be of opinion that the defendant was entitled to the property as purchaser according to the terms of the deed, then that the plaintiff might be declared entitled to a lien for the 20*l.* and the amount of calls paid, and might have relief on that footing: *Held*, by the Lord Justice KNIGHT BRUCE, the Lord Justice TURNER doubting, that the bill was not demurrable, on the ground that it set up two inconsistent cases.[1]

THIS was an appeal by the defendant from an order of the Master of the Rolls overruling a demurrer. The substance of the allegations of the bill was as follows:—

That in January, 1860, the plaintiff was entitled to three shares

[1] See 2 Dart V. & P. (4th Eng. ed.) 947; 1 Dan. Ch. Pr. (4th Am. ed.) 384, 385.

and a half in the Birkenhead and Tranmere Building Society, in respect of which he had received, according to the rules of the society, 420*l.*, and to a piece of ground and houses, which he had mortgaged to the society to secure the 420*l.* and his subscriptions and fines.

That in January, 1860, the plaintiff expected to leave Tranmere and reside elsewhere, and requested the defendant to manage his property and affairs for him during his absence, which the defendant agreed to do. That in pursuance of and for the purpose of facilitating this arrangement a deed dated the 17th of January, 1860, was executed, which recited that the plaintiff had made all the payments which had become due in respect of his shares in the building society, and that the defendant had taken from the plaintiff all his shares therein and had contracted for the purchase of the land and houses, * and thereby the plain- * 239 tiff, in consideration of the sum of 20*l.* therein expressed to be paid to him by the defendant and of the covenant on the part of the defendant thereinafter contained, conveyed the ground and houses to the defendant in fee, subject to the repayment of the sums due to the building society; and the defendant covenanted with the plaintiff to pay all sums payable to the society and observe the rules and regulations as to the shares, and indemnify the plaintiff against such payments and all claims and demands in respect thereof.

That the plaintiff never gave up possession of the ground and houses, and no transfer of the shares was ever made to the defendant. Shortly after the execution of the deed, the plaintiff gave up his intention of removing from Tranmere and applied to the defendant to reconvey the premises, which the defendant refused to do.

Par. 6. "To justify his refusal the defendant alleges that the said deed of the 17th day of January, 1860, was in fact as well as in form an absolute conveyance by the plaintiff to the defendant by way of sale of the plaintiff's estate and interest in the said piece or parcel of land and houses, and that the said shares in the said building society were agreed to be transferred at the same time and for the same consideration, and that such consideration was the payment of the said sum of 20*l.* and the covenant on the part of the defendant contained in the said deed."

Par. 7. "Such allegation is entirely unfounded. No money

was paid by the defendant to the plaintiff, and no consideration passed between them. Whatever was the form of the said deed, the same was, as between the plaintiff and defendant,
* 240 intended to give the defendant * the full power and disposition over the said land and houses and not to vest any beneficial property or interest in him the said defendant, and the recital inserted in the said deed, that the defendant had taken the said shares in the said society, was intended to have the same and no other effect. The said deed was expressed to be in the form of a conveyance merely for the purpose of preventing any question arising as to the defendant's power of disposal over and management of the property therein comprised."

Par. 8. "The sum of 20*l*., in the said deed expressed to be the consideration for such alleged conveyance, would have been quite inadequate, the plaintiff having already paid to the building society upwards of 125*l*. on account of the said land and houses, and having expended other moneys of his own in the purchase and building thereof."

Par. 9. "At the date of the execution of the said deed and of the said transfer there remained due from the plaintiff to the said building society on account of the said advance of 420*l*. and interest and of subscriptions and other payments a sum of 300*l*. or thereabouts. The plaintiff has, since the execution of the said deed, paid 129*l*. 9*s*. 9*d*. to the said building society by the instalments and in manner prescribed by their articles. The defendant has never paid any sum or sums of money to the said building society on account of the said liability."

That the defendant had recently given notice to the trustees of the building society of his intention to pay off all moneys due to them, and had required an account of the moneys remaining due, and a reconveyance from them.

* 241 * The bill charged that even if the defendant was entitled to treat the deed as a conveyance by way of sale, the plaintiff was entitled to receive the 20*l*., and also to a lien on the ground and houses for all moneys paid by him to the building society in respect of his shares since the execution of the deed, with interest on such sums from the times of payment.

The bill prayed for a reconveyance by the defendant or a cancellation of the deed, and for a declaration that the defendant had

no interest in the shares. But if the Court should be of opinion that the defendant was entitled to be treated as a purchaser of the property according to the terms of the deed, then that an account might be taken of what was due in respect of the purchase-money of 20*l.* with the interest thereon, and an account of all moneys paid by the plaintiff to the building society since the execution of the deed with interest thereon; that the plaintiff might be declared entitled to a lien for such moneys and interest; that the defendant might be decreed to pay the same, and that, in default of his so doing, the property might be sold and the proceeds applied in payment of what should be so found due.

The defendant demurred to this bill for want of equity and multifariousness, and the Master of the Rolls overruled the demurrer with costs, on the ground that it was not necessary to allege in the bill that the trust was evidenced by writing. The defendant appealed.

Mr. Hobhouse and *Mr. W. W. Cooper*, for the appellant. — The decision of the Master of the Rolls, if upheld, will do away with demurrers founded on the Statute of Frauds, there being no allegation in this bill of any * thing to satisfy the * 242 17th section of the statute, which requires a trust to be evidenced by writing. That advantage may be taken of the statute by demurrer is now settled. *Wood* v. *Midgley*, (*a*) *Barkworth* v. *Young*. (*b*) Then we say that the alternative relief asked cannot save the bill, but is in fact of itself fatal to it. The plaintiff alleges the nullity of the conveyance, saying that there was no such contract as appears on the face of it. Then he says, if I fail in that contention, and the Court holds that there was a contract for sale, I ask to have it carried into complete effect. This is joining two inconsistent cases in the same bill, and is oppressive, the alternative relief being what the defendant might have been willing to give without suit. The cases show that such inconsistent claims as these cannot be united. A plaintiff must allege one consistent state of facts, and ask the Court to give relief founded on it; not allege two inconsistent states of fact, and pray that he may have relief on one or the other of them. *Lindsay* v. *Lynch*, (*c*) *Deniston* v. *Little*, (*d*) *Kendall* v. *Beckett*, (*e*)

(*a*) 5 De G. M. & G. 41.
(*b*) 4 Drew. 1.
(*c*) 2 Sch. & Lef. 1.
(*d*) 2 Sch. & Lef. 11, *n*.
(*e*) 2 R. & M. 88.

Cawley v. *Poole*, (*a*) *Wright* v. *Wilkin*, (*b*) *Edwards* v. *Edwards*, (*c*) *Rawlings* v. *Lambert*, (*d*) *Thomas* v. *Hobler*. (*e*)

Mr. Baggallay and *Mr. Jackson*, for the plaintiff, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — I am of opinion that it would be in a high degree inconvenient if both the points raised by this bill could not be included in one suit. The plaintiff
* 243 had an * estate which he conveyed to the defendant, the conveyance on its face appearing to be a conveyance by way of sale in consideration of 20*l.* paid by the defendant to the plaintiff and of a covenant on the part of the defendant. The plaintiff says, that this conveyance was made to the defendant only as a trustee for some purpose of the plaintiff which he has since abandoned, and calls upon the defendant to reconvey the property to him. The defendant refuses, asserting that the form of the conveyance expresses the true nature of the transaction. The plaintiff then says, "Assuming your view of the case to be true, there is a sum of 20*l.* which you were to have paid, but have not paid, me, and I have paid other sums in respect of the property, which, according to the terms of the conveyance, you were bound to pay, and I am entitled to a charge on the property for these sums." The 6th, 7th, 8th, and 9th paragraphs of the bill, in my judgment, exclude a demurrer. I therefore agree in the conclusion of the Master of the Rolls, without expressing any opinion as to the reasons which he has given. The appeal will be dismissed, and, if the Lord Justice agrees, with costs.

THE LORD JUSTICE TURNER. — I give no opinion on the case, not being at present quite satisfied on the question whether the bill is not demurrable as uniting two inconsistent cases, though I might, on further consideration, be so satisfied. My doubt, however, does not prevent my concurring in the view of my learned brother as to the costs of the appeal.

(*a*) 1 Hem. & M. 50.
(*b*) 4 De G. & J. 141.
(*c*) Jac. 335.
(*d*) 1 J. & H. 458.
(*e*) 8 Jur. (N. S.) 125, L. C.

* *In re* BRETTLE. * 244

BRETTLE *v.* BURDETT.

1864. June 8. Before the LORDS JUSTICES.

An executor, who was also a legatee, borrowed 500*l.* and gave the lender a memorandum reciting that the money was borrowed for the purposes of the will, and agreeing to charge the trust estate, "so far as he could and lawfully might," and his legacy, and a policy, which was part of the assets, with the repayment, and to execute a mortgage. Afterwards the executor borrowed from the same person 400*l.*, and by a deed reciting the will and stating certain sums to be due from the estate to the executor, and that the executor owed the lender 900*l.*, the executor assigned to the lender all the sums mentioned to be due from the estate to the executor by way of security for the 900*l.* with interest: *Held*, that the lender had by this deed given up such claim, if any, against the testator's estate, as he had under the memorandum, and could only establish a security upon the executor's beneficial interest.[1]

THIS was an appeal by Robert Cook from an order of the Master of the Rolls.

Alfred Brettle, by will dated the 13th of November, 1852, appointed F. Burdett, C. S. Burdett, T. Cruttwell and R. Cruttwell executors and trustees of his will, and bequeathed to each of them a legacy of 500*l.* By a codicil dated the 24th of July, 1856, he appointed J. Clancy and W. A. S. Pemberton trustees and executors in the place of the two Burdetts, and revoked the legacies to the Burdetts and gave them to Clancy and Pemberton as a compliment for undertaking the trusts. By another codicil, dated the 21st of October, 1856, the testator revoked the appointment of Clancy to be trustee and appointed F. Burdett to be a trustee and executor.

The testator died in November, 1856, and his will and codicils were proved in June, 1857, by Burdett, Pemberton, and T. Cruttwell.

In December, 1856, before probate, Pemberton applied to Robert Cook for a loan of 500*l.* to enable him to pay the testator's funeral and testamentary expenses. Cook advanced the sum, and the following memorandum was signed and given to him by Pemberton:—

[1] See Lipscomb *v.* Lipscomb, L. R. 7 Eq. 501.

*245 * "Memorandum made this 11th day of December, 1856.—In consideration of Mr. Robert Cook, of No. 18 Warwick Street, Regent Street, having this day advanced to me the sum of 500*l.*, for the purpose of paying certain expenses incidental to the trusts of Mr. Alfred Brettle's will, I hereby agree to charge the said trust estate as far as I can and lawfully may, as also my legacy of 500*l.* under a codicil to the said will, and particularly a certain policy in the United Kingdom Life Assurance Company, No. 9349, for 3000*l.* on the life of the said Alfred Brettle, which is subject to a claim of 2000*l.* to Mr. William Ashwell, with the payment of the said sum of 500*l.* and interest thereon, and I will execute a good and efficient deed at my expense, assigning the said trust property, policy, legacy, and premises to the said Robert Cook, his executors, administrators, and assigns, containing all usual powers and covenants."

Cook afterwards made further advances to Pemberton amounting to 400*l.*

By indenture dated the 24th of July, 1857, reciting that Brettle had made his will, dated the 13th of November, 1852, and had by a codicil bequeathed 500*l.* to Pemberton, and appointed Cruttwell, Burdett, and Pemberton executors, and that they had proved the will and codicil in the Prerogative Court of Canterbury, and that Pemberton had a claim against the estate for professional services as an attorney and solicitor amounting to 213*l.* 15*s.* 11*d.* and upwards, and for payments made by him as executor for the funeral expenses, amounting to 122*l.* 16*s.*, and for rent paid by him as such executor 42*l.* 12*s.* 6*d.*, and that Pemberton was indebted to Cook in the sum of 900*l.* and that Pemberton had not received any part of the testator's estate, and that Pemberton had requested Cook * to allow the said debt due to him *246 to stand over until the 14th of August then next, and that Cook had agreed to do so upon having it secured with interest at 3*l.* per cent per month: Pemberton assigned the legacy of 500*l.* and all interest to accrue due thereon, and the said several debts of 213*l.* 15*s.* 11*d.*, 122*l.* 16*s.*, and 42*l.* 12*s.* 6*d.* due to Pemberton from the estate, and all interest to accrue due thereon, to Cook, his executors, administrators, and assigns by way of mortgage to secure the 900*l.* with interest at the rate aforesaid.

The memorandum of December, 1856, was not given up by Cook on the execution of this deed.

Shortly before the date of this deed, on the 13th of July, 1857, an order had been made on summons for the administration of the testator's estate. By the chief clerk's certificate it was found that Pemberton had received personal estate to the amount of 469*l.* and was entitled to be allowed on account 334*l.* only, and moreover that he was indebted to the testator at his decease to the amount of 104*l.* at least, after allowing for all sums due to him in respect of professional services.

By the order on further consideration dated the 27th of June, 1859, it was declared that Cook was entitled, by virtue of the agreement of the 11th of December, 1856, and the deed of the 24th of July, 1857, to a charge on so much only as in taking the account between Pemberton and the estate of the testator should be coming to Pemberton in respect of his legacy of 500*l.*

The principal question raised by the present appeal was, whether by virtue of the memorandum Cook had not a good charge on the assets, and not merely on Pemberton's beneficial interest. The appellant also * sought to vary the certificate on the * 247 ground that by mistake a sum of 250*l.* had been charged against Pemberton in taking his account which ought not to have been so charged.

Mr. Baggallay and *Mr. Horsey*, for the appellant. — A mortgage of assets by the executor will be upheld unless there is something to put the mortgagee on inquiry whether the executor is not committing a breach of duty. *Nugent* v. *Gifford*, (*a*) *Macleod* v. *Drummond*, (*b*) *Taner* v. *Ivie*. (*c*) Cook is therefore entitled, under the memorandum, to a charge on the assets. The executor could not even bury the testator without borrowing money, and the circumstances, therefore, justified a mortgage.

Mr. Selwyn and *Mr. Boyle*, for some of the residuary legatees. — The deed of 1857 either interprets the memorandum of 1856, or is substitutionary for it, and the incumbrancer cannot go back to the memorandum and treat it as if it were the only instrument. There is a security on Pemberton's beneficial interest and nothing

(*a*) 1 Atk. 463. (*b*) 17 Ves. 152. (*c*) 2 Ves. 466.

more, and that interest is nothing. The estate never had the benefit of the money.

Mr. Beales, for Burdett and Cruttwell.

Mr. Bury, for other parties.

Mr. Baggallay, in reply. — It is said that Pemberton misapplied the money, so that the estate never had the benefit; but
* 248 that is a * matter with which a mortgagee has nothing to do. The deed of 1857 is not to be treated as doing away with the memorandum of 1856. There was a charge of 500*l.* on the estate by the memorandum, and though the subsequent deed does not purport to charge the whole estate with the 900*l.*, there is no reason why it should take away the security which the creditor already had for the 500*l.* If the second security was substitutionary, why was not the first given up?

The Lord Justice TURNER, after disposing of the question as to the 250*l.*, proceeded as follows: —

As to the question whether the appellant is entitled to a charge upon the testator's estate, and not merely upon Pemberton's interest in it, I do not mean to throw the slightest doubt upon what was said by Lord ELDON in *M'Leod* v. *Drummond* as to the power of an executor to pledge the assets. But in order to determine whether the assets are effectually charged, all the circumstances of the case must be taken into consideration. Now upon the language of the memorandum this observation occurs, that the words "so far as I can and lawfully may" are ambiguous. They may mean either so far as I can do so as executor, or so far as I can do so in respect of my interest in the estate. This ambiguous instrument is followed by a deed creating a security for 900*l.*, including the 500*l.* covered by the memorandum and further advances. It has been ingeniously argued that this deed is a deed of further security and further charge. But it does not mention the memorandum; it is framed as an original security for one sum of 900*l.* If the parties had intended to treat it as a further security, there would have been a recital of the memorandum as the original security for 500*l.* If then there was a charge on the estate by virtue of

the memorandum, I * think that by the deed the parties * 249 treated such charge as no longer existing, and left the rights of the mortgagee to depend on the deed alone, which clearly does not create a charge on the general estate. One reason against holding that the parties intended the memorandum to remain in force is, that the interest made payable under the deed is different from what could be claimed under the memorandum. I think that the appeal must be dismissed, and, if my learned brother agrees, with costs.

THE LORD JUSTICE KNIGHT BRUCE. — I agree.

In the Matter of J. B. BRISCOE, a Lunatic;

AND

In the Matter of The LANDS CLAUSES CONSOLIDATION ACT, 1845; and of The LANDS CLAUSES CONSOLIDATION ACTS AMENDMENT ACT, 1860; and of The LIVERPOOL IMPROVEMENT ACT, 1851.

1864. June 10. Before the LORDS JUSTICES.

Where freehold land of a lunatic had been taken by a corporation under the provisions of the Lands Clauses Consolidation Act, and the committee petitioned for leave to convey to the corporation and to have the purchase-money carried over to the credit of the lunacy and invested: *Held*, that the next of kin of the lunatic were proper parties to the application, and that their costs, as well as those of the heir-at-law, must be paid by the corporation.

IN this case certain freehold land of the lunatic being required by the corporation of Liverpool for the purposes of a local Act, which incorporated the Lands Clauses Consolidation Act, the committee had agreed for the sale of the land to them, and the purchase-money had been paid into Court in manner provided by the Lands Clauses Act. The committee now presented a petition asking for a confirmation of the Master's report * approving of the sale, and that the committee might be at liberty to convey to the corporation, and that the purchase-money might be carried over to the credit of the lunacy, "the real-estate account," and invested. * 250

The petition was served upon the corporation and upon the next of kin and heir-at-law of the lunatic.

Mr. Jackson, for the petitioner, asked that the costs of all parties might be paid by the corporation. He referred to the Lunacy Regulation Act, 16 & 17 Vict. c. 70, § 75, the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, § 80, *Re Taylor*, (*a*) and *Re Walker*. (*b*)

Mr. Renshaw, for the next of kin.

Mr. North, for the corporation, contended that the next of kin had no interest and were not proper parties to the proceedings, and that the corporation ought not to pay their costs.

THE LORD JUSTICE TURNER. — The Lunacy Regulation Act requires that the next of kin should be served with notice of all applications in lunacy relating to the lunatic's property. They were, therefore, necessary parties to this proceeding, and the corporation must pay their costs.

The Lord Justice KNIGHT BRUCE concurred.

* 251 * The order directed that the reasonable and proper costs, charges, and expenses of the heir-at-law and next of kin of the proceeding before the Master, and of this application and consequent thereon, should be taxed, and be paid by the corporation.

(*a*) 1 Mac. & G. 210. (*b*) 7 Railw. Cas. 129.

THE SOLICITORS' AND GENERAL LIFE-ASSURANCE SOCIETY *v.* LAMB.

1864. June 2, 3, 13. Before the LORDS JUSTICES.

A policy of life-assurance contained a provision that if the assured should die by his own act the policy should be void, except to the extent of any interest acquired therein by actual assignment by deed for valuable consideration, or as security or indemnity or by virtue of any legal or equitable lien as security for money. The assured assigned this policy by deed by way of mortgage to secure an amount far exceeding the sum assured, the security including also real estates of considerable value. The assured afterwards died by his own hand. The office paid to the mortgagee the sum assured and then filed a bill claiming to have the mortgage debt thrown primarily on the real estate comprised in the security, or at least to have it apportioned between the policy money and the estates according to their values, and to have the whole or the apportioned part of the policy moneys raised out of those estates and repaid: *Held*, affirming the decision of Vice-Chancellor WOOD, that (apart from the question as to the effect of the payment by the office) the office had no equity against the real estates comprised in the mortgage.

THIS was an appeal by the plaintiffs from a decree of Vice-Chancellor WOOD dismissing their bill. (*a*)

Frederick Lamb, since deceased, had, in the year 1853, effected two policies of assurance on his own life in the plaintiffs' office. Each policy had indorsed upon it the following condition among others: —

"That if any person who has assured his own life shall die by duelling or by his own act, whether felonious or not, or by the hands of justice, this policy shall become void, except to the extent of any interest acquired therein by actual assignment by deed for valuable consideration, or as security or indemnity, or by virtue of any legal or equitable lien as security for money, upon *satisfactory proof to the board of directors of the existence and extent of such interest. But in case the assured continue to be the holder of the policy up to the time of his decease, the directors may, if they think fit, pay or allow for the benefit of his family any sum not exceeding the amount the society would *252

(*a*) 1 Hem. & M. 716.

have paid to the assured for the purchase of his interest in the policy on the day of his death."

Soon after these policies had been effected, Lamb borrowed money from Thomas Ridgway upon the security of these policies and of some freehold and copyhold estates, and he duly assured the estates and assigned the policies to Ridgway by way of mortgage to secure sums amounting to 8000*l*. The mortgage debt exceeded the amount assured by the policies, but the whole property included in the security greatly exceeded the debt.

In 1861 Frederick Lamb died by his own act. The defendant, M. A. Lamb, was his personal representative.

After Lamb's death, Ridgway brought an action in the name of M. A. Lamb against the plaintiffs to recover the moneys assured by the policies. The company pleaded that Lamb had died by his own act, and the plaintiff in the action replied by setting up the mortgage. The action did not proceed to trial, but, in 1862, the plaintiffs, with the concurrence of M. A. Lamb, paid to Ridgway the sums assured by the policies. These sums, together with the value of the freehold and copyhold estates comprised in the security, considerably exceeded the mortgage debt, and the company filed their bill asking that, subject to what remained due on Ridgway's mortgage, they might be declared entitled to a charge upon the freehold and copyhold estates comprised in his mortgage
* 253 for what they had paid under the * policies, or that, if they were not entitled to this, the mortgage debt might be apportioned on the different properties comprised in the mortgage according to their respective values, and that the plaintiffs, subject to Ridgway's mortgage, might be declared entitled to a charge on the freeholds and copyholds for the amount which the plaintiffs had paid in excess of the proportion of the mortgage debt, which upon such apportionment should be found attributable to the policy moneys, and that the amount of such charge might be raised by sale.

Vice-Chancellor Wood having dismissed the bill, the plaintiffs appealed.

Mr. Rolt and *Mr. Surrage*, in support of the appeal. — The intention of the proviso in the policy is to protect the interest of an

assignee for value, not to enable the estate of the assured to retain an interest in the policy. The beneficial interest of the assignee is alone protected by it. Now, where the policy is included in a security along with other property, the beneficial interest of the mortgagee in it is that portion of the mortgage debt which upon a fair marshalling is properly attributable to the policy. We say that the beneficial interest is so much of the debt as cannot be recovered from the estate of the debtor: *Cooke* v. *Black*; (*a*) and that the mortgage debt ought to be thrown primarily on the other property comprised in the security, the insurance company being virtually sureties; but if not, we say that the mortgagee's interest in the policy is, at all events, no more than that apportioned part of the debt which would be thrown upon the policy by apportioning the debt between it and the other property in the security ratably according to their respective values. The rights of the parties cannot depend upon the order in which the mortgagee resorts * to his securities. The respondents can only sup- *254 port their case by showing that the policy is primarily liable to the mortgage debt, a contention for which there is no pretence. Suppose the mortgagee, immediately after the testator's death, had raised the amount of his debt by sale of the other property in the security, how could a claim have been maintained against the office for the policy money?

Mr. Giffard and *Mr. G. O. Morgan*, for the respondents. — The argument on the other side ignores the nature and terms of the contract between the parties. Suretyship has nothing to do with the case. *Dalby* v. *India and London Life Assurance Company*, (*b*) overruling *Godsall* v. *Boldero*, (*c*) shows that a policy of life-assurance is not a contract of indemnity. Here the policy had been assigned for value; there was at law no defence to the action by the assignee; what equity is there to vary the case? How far do the appellants mean to push their alleged equity? Suppose the policy had been mortgaged alone and the mortgagee had received the sum assured, and so been paid his debt, would the company have claimed to prove against the mortgagor's assets under the covenant to pay? Clearly they could not sustain such a claim, and the claim against other property included in the security is of

(*a*) 1 Hare, 390. (*b*) 15 C. B. 365. (*c*) 9 East, 71.

the same nature. If the company have paid more than they ought, they have paid in their own wrong with full knowledge of the facts, and whether they have a remedy at law or not, they have none here. The proviso is to be taken most strongly against the company: *Notman* v. *The Anchor Insurance Company*, (*a*) *Dufaur* v. *Professional Life-Assurance Company*; (*b*) but even without this it does * not import what the appellants contend for. * 255

It really comes to no more than this, that the assured is not to have the benefit of the policy if, being the holder, he commits suicide. The object of the proviso is not to protect purchasers; its object is to attract business to the office by making its policies a good negotiable security, and so more advantageous to the assured. The case of *Cook* v. *Black* was on a very different form of proviso, and nothing was decided in it which can affect the present case. Suppose the mortgagee had sold the whole property, could the insurance company have filed a bill to apportion the surplus. If the company wished properly to raise the equity on which they insist, their proper course would have been to file a bill to redeem. The doctrine of marshalling is not to be extended.

Mr. Surrage, in reply. — The effect of the respondents' argument is, that if the assured makes a mortgage of his policy for ever so small a sum, his estate gets the full benefit of the insurance though he commits suicide. This cannot be the fair construction of the proviso.

Judgment reserved.

June 13.

THE LORD JUSTICE KNIGHT BRUCE. — In this case Mr. Lamb, whose life was assured by the policies in question, mortgaged them and other property belonging to him, fairly, as it seems, and for valuable consideration, to Mr. Ridgway, who is not a party to the cause. And the state of security and of debt between Mr. Lamb and Mr. Ridgway at the time of Mr. Lamb's death was such as to render it immaterial between his estate and Mr. Ridgway, and between the plaintiffs, the * insurers, and Mr. Ridgway, that Mr. Lamb died by his own hand. The policies in question were at and after his death, as between his estate and Mr. * 256

(*a*) 4 Jur. (N. S.) 712. (*b*) 25 Beav. 599.

Ridgway, and as between the plaintiffs and Mr. Ridgway, not less effectual than if the clause as to suicide contained in each had been wholly omitted from each of them. Accordingly Mr. Ridgway, before the filing of the bill, received from the insurance office represented by the plaintiffs the full sums assured by the policies, just as if neither of them had contained a clause relating to suicide: not, therefore, in any view of the matter does the office or do the plaintiffs owe any thing on either policy. But Mr. Ridgway's debt from the estate of Mr. Lamb may be taken not to have been fully paid; it may be taken, however, that the property of Mr. Lamb included in Mr. Ridgway's mortgage security was and is sufficient, with what Mr. Ridgway has received from the policies, to pay off Mr. Ridgway's security, and leave a surplus for the defendant, the personal representative of Mr. Lamb, which surplus it is the main object of this suit to obtain from her for the purpose of indemnifying the insurance office against the policies, but not to an amount beyond what may be necessary for that indemnity. This demand Mrs. Lamb resists, and was thought by the Vice-Chancellor WOOD justified in resisting. I think so too. Not any fraud or collusion is, in my opinion, proved to have existed on her part or on the part of Mr. Ridgway, who is, I repeat, absent from the record. He was not affected by the clause against suicide, but, notwithstanding that clause, was entitled to receive and did previously to the suit receive the sums assured by the policies as if such a clause had not existed, and was and is entitled to retain for his own use what he so received, a greater amount having been then due to him on his security. It is true that Mr. Lamb's estate, if there had been no security to Mr. Ridgway, could probably * or certainly have recovered nothing against the * 257 office, as Mr. Lamb died by his own hand; and it is true that his estate derives benefit or relief to the amount of the policies, as matters stand at present, from the sum or sums received by Mr. Ridgway from the office. But that state of things is insufficient in my opinion, there being an absence of fraud and of collusion, to create or raise between the parties before us such an equity as that claimed by the bill. It seems to me that, as between them, matters must remain as they did before the suit, and that the plaintiffs have not any charge or lien upon the surplus which has been, is, or will be, in Mr. Ridgway's hands, or any claim on Mrs. Lamb or on the estate of the deceased.

The language of the policies cannot, I think, be construed as prohibiting Mr. Lamb or his estate from deriving, however remotely or indirectly, any benefit in any circumstances from them in the event of suicide, and the advantage which happens in the present instance to have been obtained cannot, in my judgment, be taken from it. I repeat that I agree in the Vice-Chancellor's conclusion.

The Lord Justice TURNER, after shortly stating the facts, proceeded as follows: —

In support of this appeal, it was first argued for the appellants, that as between them and the estate of F. Lamb, the whole amount of the moneys secured by the mortgage ought to be thrown upon the freehold and copyhold estates so far as they would extend after payment of Ridgway's mortgage, and that, the policy moneys having been applied in part payment of the mortgage, the appellants were entitled to a charge upon the freehold and copyhold estates for the amount so applied, — the argument, as I
* 258 understood it, resting upon this ground, * that, according to the true meaning and effect of the condition indorsed upon the policies, the assured, having died by his own hands, was not as between him or his estate and the plaintiffs entitled to have any benefit from the policies; but it does not appear to me that the construction thus attempted by the plaintiffs to be put upon the condition can be maintained. The condition distinguishes between cases in which the assured continues to be the holder of the policy up to the time of his death, and cases in which he has parted with the policy for value. In the former case the payment to be made to the assured is dependent upon the discretion of the directors, but in the latter case no such discretion is reserved. Looking at the discretion given in the case of the policy not having been assigned, it is not, I think, reasonably to be supposed that in the case of the policy having been assigned for value there should be no payment to the assured, even at the discretion of the directors, but yet in all cases of policies being mortgaged the payment could not be otherwise than for the benefit of the assured, as his estate would, *pro tanto*, be exonerated. Again, in the cases put in the argument on the part of the respondent, upon the sale of the policies, or on mortgage of them, no other property being

included in the mortgage it seems to be clear, that according to the terms of the condition, the amount due upon the policies would be payable by the office, and yet in each of these cases the payment would enure directly or indirectly for the benefit of the assured, but if this would be the case in the event of no other property being included in the mortgage, it is very difficult to see how the case can be altered by other property being included in it. To construe this condition as importing that the assured was not as between him and the office to have any benefit of the policy would indeed, as it seems to me, be directly to contradict the very terms of the condition, * for the condition in terms * 259 imports that the policy is to be valid to the extent of any interest acquired therein by assignment for value. This argument, therefore, on the part of the appellants cannot, in my opinion, be maintained. It was then said, on their part, that there ought to be contribution between the freehold and copyhold estates and the moneys assured by the policies, and that they are entitled to a charge for what has been paid out of the policy moneys beyond what would have been payable upon such contribution. But the office is not in any way in the position of surety. It is principal debtor for whatever is due upon the policies. In paying what is so due it is doing no more than paying what both at law and in equity it is bound to pay, for there cannot be a different construction of the contract at law and in equity. Looking at the case simply in this point of view, the appellants' contention would amount to this, that where a creditor has made a debt which is due to him subject, with other property, to a mortgage, the debtor is entitled to insist on contribution, a position which clearly could not be maintained. The appellants, however, insist that this is not the true view of the case, inasmuch as according to the condition there would be no debt due to the policy-holder so long as he retained the policy. But this does not seem to me to alter the case, for upon the policy being assigned for value the debt would become due to the assignee. It was much urged on the part of the appellants, that to hold the assignee to be entitled to recover upon the policies without the office being entitled to repayment or contribution would be to put it in the power of the assignee to elect whether the office should or should not be liable upon the policies, but it is to be observed that by this condition the office has held out to the assured that they may assign their policies,

and that their assignees for value will be entitled to pay-
* 260 ment upon them, and in this state of circumstances * it is not, I think, competent to the office to raise any question upon this ground. The policy-holder being authorized by the office to assign, the assignment, as I conceive, takes effect as if the property assigned was the absolute property of the assignor. There is no longer any question between the assignor and the office, and there can be no question of contribution between the assignor and the assignee. If the appellants think it will be for their benefit to claim either payment in full or contribution in such cases as the present, they must, I think, alter this condition. Of course nothing which I have said has any reference to cases of fraud, no fraud being imputed in this case; and as to the consequence to be attributed to the payment having been made by the appellants I say nothing, it not being in my opinion necessary to do so. Upon the grounds which I have stated, my opinion is, that this decree is right, and that the appeal ought to be dismissed and with costs.

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* 261 * MARTYR *v.* LAWRENCE.

1864. May 7, 9. June 13. Before the Lords Justices.

A shop was demised to H. C., the landlord retaining the right of occupying the flat roof. Shortly afterwards the landlord demised an adjoining house to another person, with the right of walking and sitting on the roof of the shop. H. C.'s lease having determined, the landlord demised the shop to the plaintiff by the description of "all that shop situate at, &c., as the same was late in the occupation of H. C." The lease of the house having afterwards determined, the landlord relet it to the defendant, with the right to occupy the roof of the shop and to erect on it a photographic studio. *Held*, by the Lord Justice Turner, affirming the decision of Vice-Chancellor Wood, *dissentiente* the Lord Justice Knight Bruce, that the words "as the same was late in the occupation of H. C." ought to be considered as inserted only for the purpose of identifying the property, and not of limiting the operation of the deed; that the lease to the plaintiff therefore gave him a right to the occupation of the roof; and that the erection of a photographic studio by the defendant was an unlawful act.[1]

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[1] See 1 Dart V. & P. (4th Eng. ed.) 415, 416, 487, 488, 792; 1 Joyce Inj. 452, 453.

THIS was an appeal from a decree of Vice-Chancellor WOOD.

The plaintiff was the tenant of a shop at the foot of Mount Zion Hill, Tunbridge Wells. The shop was a one-storied building, having over it a flat leaden roof. The defendant was the tenant of a house called "the cottage," which abutted upon the shop, and there was a window in the cottage which opened upon the flat leaden roof of the shop. The shop and cottage had long been held under the same landlord.

By an indenture dated the 10th of October, 1846, the shop was demised by the then landlord to Henry Corke, for the term of twenty-one years from the 29th of September, 1846, by the following description: "All that shop now used as a cloth mart, and the tailor's workshop thereunto adjoining and belonging, situate and being at the foot of Mount Zion in Tunbridge Wells aforesaid, together with all rights, privileges, easements, commodities and appurtenances whatsoever to the said shop, workshop, hereditaments and premises or any part thereof belonging or usually held or enjoyed therewith." There was a proviso in this lease by which the term was made to cease on the bankruptcy of Henry Corke.

* By an agreement dated the 10th November, 1849, the * 262 then landlord, for the purpose of the shop being enlarged, agreed to lease to Henry Corke a small strip of ground lying at the back of the shop for a term of eighteen years from the 29th of September then last (being a term expiring at the same time as the term granted by the above-mentioned lease) determinable on the bankruptcy of Henry Corke; and by this agreement Henry Corke agreed that, in consideration of the landlord's making this enlargement of the shop, it should be lawful for the landlord to take and retain possession and have the exclusive use and enjoyment, during the lease, of the external parts of the roof or leaden flat of the shop, and of the intended new building, and of continuing or fresh covering the same with earth, and making a lawn or flower garden thereon, or for any other use or purpose that might not be to the injury or damage of Henry Corke, or render the shop and premises unsafe or insecure.

In the month of October, 1861, Henry Corke became bankrupt, and the lease and agreement under which he held thereby determined. The then landlords thereupon, by an indenture dated the 18th of December, 1861, made in pursuance of an agreement for

that purpose dated the 11th November, 1861, demised the shop to the plaintiff and Charles James Long for the term of twenty-one years, by the description of "all that shop situate at the foot of Mount Zion Hill in Tunbridge Wells aforesaid as the same was late in the occupation of Henry Corke, together with the appurtenances thereto belonging." By this lease the tenant covenanted to keep the shop and premises in repair, except as thereinafter mentioned, and the landlords covenanted that they would at all times during the continuance of the term keep in repair the lead flat and iron fencing at the top of the shop. A few
* 263 * days after the execution of the lease, Charles James Long's interest in the demised premises was assigned by him to the plaintiff.

By an indenture dated the 30th of May, 1853, the then landlord demised the cottage to Mr. William Tinkler Heather, together with the fixtures mentioned in the schedule to the lease, and together with the right to the said William Tinkler Heather, his executors, administrators, or assigns, or his or their lodgers or under-tenants and servants, at all times to walk, sit, and promenade over and along the leaden roof or flat of the shop in the occupation of the said Henry Corke, and all other easements and appurtenances to the demised premises belonging, for the term of fourteen years, determinable at the expiration of the first seven years; and by this indenture Heather covenanted not to use the roof or flat over the shop for any other purpose than to walk, sit, or promenade thereon, and not at any time during the term to put or place on the roof or flat any turf, mould, earth, or any other weighty substance by means of which the roof might be injured or destroyed or rendered unsafe or insecure, and not to do any act or thing to the annoyance or prejudice of the said Henry Corke, or other the person or persons for the time being occupying the shop, and during the term to keep the lattice-work and awning on the roof or flat in tenantable repair, and at the expiration of the term to surrender the demised premises with the appurtenances, together with the fixtures, articles, and things in and upon the premises enumerated in the schedule in a good state of repair and condition. The schedule to this indenture was as follows: "One lead flat over Mr. Corke's shop; latticing round over door and on lead; brick frame for flowers; brass tap; four window-shades; cast-iron fence round front and sides."

* Heather occupied the cottage and other the premises * 264 demised to him by this lease until the 24th of June, 1860, when his lease was determined, and he quitted possession of the premises. The cottage was afterwards let to the Rev. Robert Fowler, who occupied it from the 1st September, 1860, to the 22d January, 1862. He appeared to have had the use and enjoyment of the lead flat over the shop in the same manner as it had been used and enjoyed by Heather, but it did not appear on what particular terms the premises were let to him. From the 22d January, 1862, to the 8th December, 1863, the cottage was unoccupied; but on the 8th December, 1863, the then landlord entered into an agreement with the defendant, whereby he agreed to execute and the defendant agreed to accept a lease of it as it was late with other property held by the Rev. Robert Fowler, together with the fixtures therein as mentioned in the schedule thereto, and together with the right for the defendant to use the roof or lead flat of the shop, and also to erect on the roof or flat any light building for the purpose of his business as a photographer and artist, he the defendant doing no damage or injury to the roof or flat or to the plaintiff, for the term of nineteen years, determinable as therein mentioned.

The bill in this cause was filed on the 5th of January, 1864, stating that on the 29th of December, 1863, the defendant, without the consent of the plaintiff, and without giving the plaintiff any notice, entered on the flat lead roof and commenced erecting a room or building partly of wood and partly of glass on the flat lead roof; that the plaintiff had by a letter of his solicitor given notice to the defendant to remove what he had already placed upon the roof and not again to enter thereon, but that the defendant had continued the erection of a room or building, and the plaintiff had accordingly served * him with a notice not to tres- * 265 pass on the roof. The 13th paragraph of the bill was as follows: —

"The defendant has, notwithstanding the letter and notice written and served by and on behalf of the plaintiff as aforesaid, continued the erection of and has erected and finished the said room or building on the said flat lead roof of the plaintiff's said shop and premises. Such room or building is constructed of wood and is fixed on and upon the said flat lead roof, and the defendant has,

since such room or building was completed, by himself, his workmen, and servants used and still uses the same for the purpose of photography and otherwise as he the defendant thinks fit. And the defendant, by using such room or building as aforesaid, daily and hourly trespasses upon the plaintiff's said shop and premises, and such room or building and the use thereof by the defendant as aforesaid are prejudicial to and injuriously affect the plaintiff's said shop and premises and the plaintiff's said trade or business, and are a great annoyance to the plaintiff, and in fact amount to a nuisance. And the erection of the said room or building in manner aforesaid will add to and increase the repairs which the plaintiff is, under the before-stated indenture of lease, liable to. And the plaintiff is by the aforesaid acts of the defendant prevented having the due and proper use and enjoyment of his said shop and premises."

The bill prayed that an injunction might be awarded to restrain the defendant from permitting the before-mentioned room or building or any part thereof to remain on the said flat roof of the plaintiff's said shop and premises comprised in the before-stated indenture of lease of the 18th of December, 1861, and that the defendant, his servants, agents, and workmen might in like
* 266 manner be restrained from using the said room or * building for the purposes of photography or for any purpose whatsoever and from otherwise in any manner trespassing upon or interfering with the said flat roof of the plaintiff's said shop and premises or any part of such roof. It proceeded to pray for damages and that all proper directions might be given and accounts taken and for general relief.

The plaintiff by his affidavit denied having had any notice of the deeds and instruments under which the defendant claimed.

The cause was heard before Vice-Chancellor WOOD, who made the following decree: —

"This Court doth order that an injunction be awarded against the defendant George Lawrence to restrain the defendant from permitting the room or building in the plaintiff's bill mentioned or any part thereof to remain on the flat lead roof of the plaintiff's shop and premises comprised in the indenture of lease of the 18th of December, 1861, in the bill also mentioned. And it

is also ordered that the defendant George Lawrence, his servants, agents, and workmen be in like manner restrained from in any manner interfering with the said flat roof of the plaintiff's said shop and premises or any part of such roof during the subsistence of the term demised by the said indenture of lease." Then followed a direction for the defendant to pay the costs of the suit. The defendant appealed from this decree.

Mr. Rolt and *Mr. Nalder*, for the plaintiff, in support of the decree. — The license to the landlord to use the flat roof was co-extensive with Corke's lease, and that having determined by his bankruptcy, the license came to an end, in 1861. We say that it was a personal license which * could not be assigned ; * 267 Shepp. Touchst. ; (*a*) and that Heather took no right to use the roof under the lease of 1853 ; but if he did, he could not take under that lease any greater interest than Corke had given to the landlord, so Heather's right determined in 1861. Assuming, however, that Heather and Fowler acquired this right for the whole period of their respective leases, and that Fowler acquired a similar right, still the lease to the plaintiff in 1861, which does not except the roof, gave the plaintiff a right to the roof as well as the rest of the property, subject to the rights which at the time when it was granted were vested in Heather or Fowler, and those rights having determined, the case stands as if they had never existed. It cannot be successfully contended that the words relied on below "as the same was late in the occupation of Mr. Henry Corke" restrict the operation of the demise to the plaintiff. Those words are merely a form of the common reference to occupancy as a means of identification, and are not restrictive. *Baird* v. *Fortune*. (*b*) The defendant, therefore, is a trespasser. The fact of the occupier of the cottage having used the roof cannot give him an easement as against the plaintiff. *Suffield* v. *Brown*. (*c*) The plaintiff is entitled to relief on the ground of nuisance. His business is injured, the expense of repairing the shop is increased, and a constant vibration is produced by people walking overhead.

Mr. Giffard and *Mr. John Pearson*, for the appellant. — We

(*a*) Page 239. (*b*) 4 Macq. 127.
(*c*) 12 W. R. 356, L. C. ; to be reported *infra*.

submit that proper effect has not been given to the words, "as the same was late in the occupation of Mr. Henry Corke." These words are not to be treated as surplusage, but must have
* 268 some effect given to them, * and their effect is to confine the demise to an enjoyment of the property in the way in which Corke enjoyed it. *Kerslake* v. *White*, (*a*) *Doe* v. *Burt*. (*b*) The words could not be inserted for the mere purpose of identification, there being a description by which the premises were sufficiently identified without them. The covenant by the lessor to repair this part of the property justifies this view. *Baird* v. *Fortune* and *Suffield* v. *Brown* are quite different from the present case, which is akin to *Nicholas* v. *Chamberlain*, (*c*) *Pyer* v. *Carter*, (*d*) *Hall* v. *Lund*, (*e*) and *Ewart* v. *Cochrane*. (*g*) The facts that the roof was visibly connected with the cottage, and that there was no approach to it from the shop, strengthen our case. Even if the Court is against us on these points, there is no case for an injunction. *Isenberg* v. *East India House Estate Company*. (*h*)

Mr. Nalder, in reply.—The words in the plaintiff's lease would not be sufficient properly to identify the property without reference to the occupation, and there is, therefore, no occasion to construe that reference as restrictive.

Judgment reserved.

June 13.

The Lord Justice TURNER, after stating the facts of the case in nearly the same terms as above, proceeded as follows:—

The bill in this case rests on two points, trespass and
* 269 * nuisance. The case as to trespass depends, as it seems to me, wholly upon the effect which, according to the true construction of the lease to the plaintiff, ought to be given to the words, "as the same was late in the occupation of Henry Corke," contained in the description of the property demised by that lease, for if those words have no controlling effect the roof in question

(*a*) 2 Stark. 508.
(*b*) 1 T. R. 701.
(*c*) Cro. Jac. 121.
(*d*) 1 H. & N. 916.
(*e*). 1 Hurlst. & C. 676.
(*g*) 4 Macq. 117, 122.
(*h*) 12 W. R. 450, L. C.; to be reported *infra*.

must, as I apprehend, have passed to the plaintiff by the lease to him, subject to any right which Fowler may have had in it during the continuance of his holding, both the lease to Corke and the lease to Heather being then determined. What then is the effect which, according to the true construction of the plaintiff's lease, ought to be given to these words? It is argued, for the defendant, that the effect of them is to qualify the demise and to subject the property, whilst occupied by the plaintiff under the lease, to the same use and enjoyment of the leaden flat or roof as it was subject to whilst in the occupation of Corke; and *Kerslake* v. *White* (*a*) and *Doe* v. *Burt* (*b*) were referred to in support of the argument; but those cases go no further than to establish that, in determining the effect to be given to deeds and instruments, regard is to be had to the state of the property affected by them at the time when the deeds and instruments were executed, — they decide nothing as to the consequences resulting from that principle. What those consequences may be must depend upon the circumstances of each particular case, and it is, I think, sufficient as to those cases to say that they widely differ in their circumstances from the present case. In this case the words in question are superadded to the description of the property demised. They are proper, if not necessary, for the identification of the property. It is said on the part of the defendant, that they were not necessary * to * 270 identify the property; but if this be so, it is only because the property may be sufficiently identified by the other parts of the lease, and it is, I think, going too far to say that the words ought not to be taken to have been inserted for the purpose of identification, because, upon an examination of the other parts of the lease, the identity would be established. The words then being proper, if not necessary, for the purpose of identification, the insertion of them ought, as I think, to be attributed to that purpose and to that purpose only. Where words in a deed or instrument are properly adapted to one purpose, they ought not, I think, unless the effect of them be clear, or the construction of them be affected by the context or by the surrounding circumstances, to be held applicable to another and a different purpose. I think so more especially in such a case as the present, in which the words are found in the description of the parcels, a part of the deed in which it was proper,

(*a*) 2 Stark. 508. (*b*) 1 T. R. 701.

if not necessary, to insert them, but in which words intended to limit the operation of the deed would not, as I apprehend, ordinarily be inserted. Had this been the intention of the parties, I think some special provisions to carry it into effect would have been inserted in some other part of the deed. In my opinion, therefore, these words ought to be taken to have been inserted for the purpose of identification merely, and leave the right of the plaintiff to the roof unqualified and unaffected. The consequence of holding otherwise would, as I apprehend, be very serious, as it would probably lead to importing into a vast number of deeds and instruments qualifications which the parties to them have never had in their contemplation, such words as these being, as I believe, very generally used in the description of parcels. Some reliance was placed, on the part of the defendant, upon the landlord's covenant to repair contained in the plaintiff's lease, but I think the fact of the * 271 covenant * having been entered into by the landlord is at least as favourable to the plaintiff's case as it can be to the case of the defendant. For the reasons which I have stated, I agree in opinion with the Vice-Chancellor as to the construction of the plaintiff's lease. It is unnecessary for me, therefore, to enter into the question of nuisance. I think that upon the construction of the lease the injunction was due, the case being one of continuing trespass. The decree appears to me to be right, and the appeal must, therefore, be dismissed, but as my learned brother takes a different view of the case, the dismissal will be without costs.

THE LORD JUSTICE KNIGHT BRUCE. — In this case my learned brother being of opinion that the decree under appeal should be affirmed, it will of course be so, though my impression is otherwise, and upon the effect of the words "as the same was late in the occupation of Mr. Henry Corke" contained in the lease of the 18th December, 1861, the language of the agreement of the 10th November, 1849, and the facts in evidence, I respectfully differ from the learned Vice-Chancellor and my learned brother. But although I am against the decree, this is of course immaterial, unless as to costs. I do not think that the respondent should have against the appellant any costs of the appeal.

* WINTER *v.* EASUM. * 272

1864. June 11, 13. July 1. Before the LORDS JUSTICES.

A married woman, entitled to income for her separate use, agreed to assist her husband in obtaining a loan from an insurance company. A policy was accordingly effected with the company, by which a sum was assured to the survivor of the husband and wife upon the death of the one first dying. By a mortgage deed of the same date, reciting an agreement for a loan by the office at the request of husband and wife, the wife assigned her separate income, and the husband the policy, by way of mortgage for securing the sum advanced by the company. By the same deed the husband and wife, the wife joining for the purpose of binding her separate estate, covenanted that the husband would pay the premiums on the policy, and there was a declaration by the husband alone that if he did not pay them the mortgagees might pay them out of the income, and a declaration by all parties that if the policy moneys became payable before the mortgage debt was paid the company might pay it out of those moneys. After the death of the husband the wife claimed the moneys payable under the policy as being a *chose in action* not settled to her separate use, and therefore incapable of being effectually assigned during the husband's life. *Held*, that although the policy if taken alone created an interest in the wife not capable of being assigned so as to bar her right by survivorship, yet as it had been created for the purpose of the mortgage, and as a part of the same transaction, and in pursuance of a contract that it should be a security to the company, the wife's interest was included in the security.

THIS was an appeal by the defendant Easum from part of a decree of the Master of the Rolls, the question being whether the moneys assured by a certain policy belonged to the plaintiff by survivorship free from a mortgage made by her and her deceased husband.

The plaintiff Catherine Winter was formerly the wife of Thomas John Winter, but now a widow. By the settlement made upon her marriage with Thomas John Winter she was entitled, at the time when the transactions which gave rise to the suit occurred, to the income of several sums of stock for her separate use without any restraint from anticipation, the settlement providing that during the joint lives of the husband and wife the income should be paid to such persons as the wife should by writing appoint, and in default of appointment, to her for her separate use. Her husband Thomas John Winter was in difficulties, and she agreed to

* 273 assist him by means of her separate income in procuring * a loan of money. This purpose was accomplished by borrowing the sum of 700*l.* of the Family Endowment Society upon the security of the following policy of insurance and indenture: —

By a policy of insurance dated the 22d of March, 1853, reciting that Thomas John Winter and Catherine his wife were desirous of effecting an insurance with the Family Endowment Society in the sum of 800*l.* upon their joint lives, and had signed the usual form of statement as to the matters material to the assurance, it was witnessed, that if Thomas John Winter and the plaintiff should regularly pay the premium of 60*l.* 16*s.* during their joint lives, the funds of the society should be liable to the payment of the sum of 800*l.* to the survivor of either [*sic*] of them Thomas John Winter and the plaintiff, his or her assigns.

By an indenture dated the same 22d of March, 1853, and made between Thomas John Winter and the plaintiff his wife of the first part, certain persons entitled to a mortgage security on the wife's life-interest of the second part, and the trustees of the society of the third part, after reciting the settlement, the mortgage to the parties of the second part, and reciting the policy as being a policy by which 800*l.* was assured to be paid to the executors, administrators, or assigns of Thomas John Winter and the plaintiff within three calendar months after the death of either of them, and that Mr. Winter and his wife had applied to and requested the trustees of the society to lend them the sum of 700*l.*, which they had agreed to do upon having the repayment with interest in the mean time secured to them in the manner hereinafter mentioned, out of which sum of 700*l.* the prior mortgage was to be paid off, it was witnessed that, in consideration of 302*l.* 6*s.* paid by the trustees in discharge of the prior mortgage

* 274 and of 397*l.* 14*s.* (the * residue of the 700*l.*) paid by the trustees to Winter and his wife, the prior mortgagees assigned, and Catherine Winter in execution of the power given by the settlement, and of all other rights and powers enabling her, appointed and assigned, and Thomas John Winter to the extent and right of his interest, if any, in the dividends, assigned and set over to the trustees, their executors, administrators, and assigns, all and singular the dividends, interest, and annual produce which should from time to time and at any time during the joint lives of Thomas John Winter and the plaintiff, and up to the time of the

death of one of them, accrue or become due from or in respect of the several sums of stock in which the wife had an interest under the settlement, and all the right, title, claim, and demand of the prior mortgagees and of Winter and his wife and each of them in, to, or out of all and singular the stocks, funds, and securities held upon the trusts of the settlement, to hold the premises appointed and assigned as above to the trustees, their executors, administrators, and assigns, subject to the proviso for redemption thereinafter contained: and further, that Thomas John Winter, the husband, assigned to the trustees of the society all that the said policy of assurance, dated the 22d of March, 1853, by which the payment of the 800*l.* was assured by the society "to the executors and administrators or assigns of the said Thomas John Winter and Catherine his wife upon the decease of either of them," and the full benefit thereof, and all moneys to become payable under it, to hold the premises to the trustees, their executors, administrators, and assigns, subject to the proviso for redemption. There followed a power of attorney given by Winter and his wife to the trustees of the society, enabling them to receive the moneys and premises thereby appointed and assigned. Then followed the proviso referred to before as a proviso for redemption, being a
* proviso for making void the deed upon payment of the * 275
700*l.* with interest as therein mentioned. Then Winter covenanted with the trustees, and the plaintiff "in order to bind her separate estate" also covenanted with them, that Winter and wife or one of them, their or one of their heirs, executors, or administrators, should pay the principal sum of 700*l.* with interest. There followed a declaration that, if the money assured by the policy should become payable before the mortgage was paid off, the trustees should stand possessed of those moneys upon the trust thereinafter declared concerning the same. Then followed a power of sale with the usual trusts of the sale moneys, which were in terms extended to the moneys received under the policy, the first trust after payment of expenses being for payment of the moneys due on the security. Then Winter, and also the plaintiff, "so far as she can bind her separate estate," covenanted with the trustees that Winter and the plaintiff or one of them had good right to assign and appoint the dividends and also the policy of assurance; that Winter would at his own expense pay the premiums on the policy and do every thing necessary for keeping it on foot; and

that Winter and wife, and all other persons claiming any interest in the mortgaged premises, would make further assurance. There followed a declaration by Winter alone, that if he made default in payment of the premiums, the trustees might pay them and reimburse themselves the amount with interest out of the mortgaged premises.

T. J. Winter died on the 13th of November, 1862. Upon his death the company claimed to deduct the mortgage debt from the moneys payable under the policy. The plaintiff thereupon filed her bill to enforce payment of the money assured, alleging that "the sum of 800*l.* secured by the said policy was a reversionary interest payable to the plaintiff on the decease of the said
* 276 * T. J. Winter, and incapable of being assigned, alienated, charged, or incumbered by the plaintiff or the said T. J. Winter in his lifetime." The bill prayed that the insurance company might be decreed to pay to the plaintiff the 800*l.* secured by the policy, with interest thereon from the time when by the terms of the policy the sum became payable; that all necessary directions might be given for raising the money; and that in any event an account might be taken of what, if any thing, was due to the society and charged on the said policy, and that the surplus might be paid to the plaintiff.

The defendant, who represented the society, by his answer submitted that the plaintiff was only entitled on the death of T. J. Winter to be paid the balance of the 800*l.* assured by the policy, after deducting therefrom the amount due for principal and interest on the indenture of the 22d of March, 1853.

The cause was heard before his Honor the Master of the Rolls on the 27th of April, 1864, and his Honor by his decree of that date declared that the plaintiff was entitled to the sum of 800*l.* secured by the policy dated the 22d of March, 1853, to be paid to the survivor of Winter and his wife the plaintiff, and to interest on that sum of 800*l.* from the 10th of March, 1863, to the time of payment, at the rate of five per cent, and that the amount due upon the policy was not chargeable with the mortgage debt of 700*l.* secured by the deed of the 22d of March, 1853; and then he directed an account of what became due to the company during Winter's life for premiums upon the policy and for interest on the mortgage debt, and what the company had received in respect thereof, and of what was due from the company in respect of the

policy for principal and interest, and the balance was to be certified; and it was ordered, that * what should be certi- * 277 fied to be due upon the balance of the said account from either of the parties to the other of them should be paid by the company to the plaintiff or by the plaintiff to the company, as the case might be.

The defendant appealed from the decree so far as it proceeded on the footing of the above declarations.

Mr. Southgate and *Mr. Jervis*, for the appellant. — The bill proceeds on the ground that this is a reversionary *chose in action* of a married woman, and therefore incapable of being effectually assigned. That might be so if the two instruments constituted two distinct transactions; but they only form one transaction, the policy being created for the very purpose of giving the security upon it, and it must be considered to have been effectually subjected to it. Moreover the policy was kept up out of separate estate: it therefore was separate estate. *Rich* v. *Cockell.* (*a*) The plaintiff covenanted so as to bind her separate estate; and the proceeds of the policy being separate estate are bound by that covenant, which, in the circumstances of this case, is virtually the same as an assignment. The security ought, therefore, to be treated as including the moneys payable under the policy, and the decree ought, to this extent, to be varied.

Mr. Hobhouse and *Mr. T. H. Terrell*, for the plaintiff. — It is impossible to ascertain what the contract between the parties was, except from the documents set out in the bill, — the evidence does not show it. The plaintiff's interest in the policy was reversionary, so it could not be effectually assigned; and the deed does not purport, and was never intended, to assign or charge, or affect that * interest. The proviso as to the application * 278 of the money payable under the policy must be read as an agreement and declaration by the husband alone. *Tullett* v. *Armstrong.* (*b*) The words "it is hereby agreed and declared" do not necessarily import an agreement by every party. *Ramsden* v. *Smith.* (*c*) The power of attorney must be read as a power given by the wife to sue for the income assigned by her, and by

(*a*) 9 Ves. 369. (*b*) 4 Beav. 319. (*c*) 2 Drew. 298.

the husband to sue for the policy moneys assigned by him, and the separate estate referred to in the covenant by the wife to pay is the separate estate which she had assigned. The decision in this case cannot be reversed without overruling *Purden* v. *Jackson* (*a*) and the series of cases which have followed it. The case is free from the moral element which existed in many of those cases, but did not prevail, viz., that the wife was an active party in procuring the loan, and knowingly did all she could to assign her reversionary interest. The married woman might have been fixed with a trust if she had been guilty of fraud; but there is no trace of misrepresentation or fraud here. Then they say this is separate property. No doubt savings of a married woman's separate estate are held to be separate property, but that is to protect them from the husband. There is no instance of this rule being applied to property which never by any possibility could come under marital control. Here is a contingent interest which belongs to the survivor of the husband and wife, but during the joint lives to neither. To hold this to be separate property would not protect the wife from her husband, but only enable her to dispose of it for his benefit. The character of separate estate was lost when the money was invested in the purchase of a reversionary interest not limited in terms to the wife's * separate use. The argument of the defendants cannot succeed, unless they reform the policy, making it a policy for 800*l.* less the mortgage debt, or a policy payable to the husband or his representatives.

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Mr. Jervis, in reply. — I admit that there is no actual assignment of the policy, but there is what amounts to a charge by the wife on her interest in the policy, and the policy being separate estate is effectually charged.

Judgment reserved.

July 1.

THE LORD JUSTICE KNIGHT BRUCE. — The chief, if not the only, question in this case seems to me to be whether the insurance for 800*l.* in dispute was originally agreed upon and originally effected with the view and for the purpose of being a security to the insur-

(*a*) 1 Russ. 1.

ance office for the principal and interest of the sum of 700*l.* advanced by the Family Endowment Office to the plaintiff and her late husband, or one of them, by way of loan. And the evidence, I think, shows that it was so, and that before and at the time of granting the policy, and before and at the time when the plaintiff executed or signed the instrument of even date with it, as she did in her husband's lifetime, this view and this purpose were known to the plaintiff and her husband, and by both acceded to. The policy and the other instrument of the 22d of March, 1853, stated in the third and fourth paragraphs of the amended bill, formed, in my judgment, a single transaction, to be acted upon and dealt with accordingly. The insurance, I am satisfied, would not have existed independently of the desire and intention to secure the loan. That I am satisfied was * its primary object, * 280 and I am convinced that, consistently with every binding authority relating to the rights of married women in personalty, the plaintiff's title to the benefit of the policy may and ought to be deemed subject to a prior title in the office, that is to say, subject to their security for the principal and interest of the loan. In other words, Mr. and Mrs. Winter were, as I view the matter, effectually constituted trustees of the policy for the office in the first instance to the extent of the 700*l.* debt and the interest on it. What the lady by her suit demands at variance with this seems to me not creditably asked for. If the policy had been effected in the joint names of the husband and wife before and independently of any loan, before and independently of any application or agreement for a loan, and afterwards, as a separate and distinct transaction, there had been a loan and such an instrument as the assignment of 1853 executed, the plaintiff might, and I assume that she would, have been entitled substantially to what she seeks; but as matters are, the case is, I think, importantly different.

The Lord Justice TURNER, after stating the facts, proceeded as follows: —

The case has come before us on an appeal by the defendant, which applies to the declaration contained in the decree, and to the accounts having been directed and relief having been given upon the footing of that declaration.

If we had to decide this case solely and exclusively upon the

policy of insurance, without reference to the deed or to the source from which the policy was derived and by which it was maintained, there could not, as I apprehend, be any serious doubt upon it. In that view of the case there would be an interest in the
* 281 plaintiff * under the policy, which neither she or her husband could have departed with, and this decree, therefore, would be plainly right. The case, however, cannot, in my opinion, be thus disposed of. The policy of insurance and the deed are parts of one and the same transaction, and, in order to arrive at a just conclusion on the case, the whole transaction, and not a part of it only, must be looked at and taken into account. Looking, then, at the whole transaction, and not at part of it only, how does the case stand? There are here two contracts, one between the husband and wife, the wife contracting in respect of her separate estate that 700*l.* shall be raised by means of the policy; the other, between the husband and wife and the office, that the policy shall be made a security to the office for the money so to be raised; and the two contracts being amalgamated together, the first becomes part and parcel of the second, and the whole is carried into effect by the husband's assigning the policy, not merely the interest of the wife under the policy, but the policy itself, to the office, with the privity and concurrence of the wife. It was attempted, on the part of the plaintiff, to meet this view of the case by saying that the wife's interest under the policy was incapable of assignment; but the policy was created and subsisted only for the purpose of being made a security to the office, — it was merely a conduit-pipe to the security, — and to give any weight to this argument would be to destroy the purpose for which the policy was created, and the very contract which the plaintiff had entered into with her husband respecting it, which was based upon the policy being assigned.

It was said, on the part of the plaintiff, that to support this transaction in favour of the office would be in effect to rec-
* 282 tify the policy; but, in my view of the case, * the policy required no rectification. Other arguments were also advanced on the part of the plaintiff, but they were all founded on the assumption of the plaintiff having a distinct and separate interest in the moneys assured by the policy, which, in my opinion, she never was intended to have, and never had, otherwise than subject to the claims of the office. Upon the whole case, even

without reference to the argument on the part of the appellant as to the plaintiff's interest under the policy having become her separate estate, and therefore capable of assignment by her, — an argument entitled, I think, to much consideration, although I doubt whether it would support the case to the extent contended for by the appellant, — my opinion is, that this plaintiff was bound by the mortgage to the insurance office, and that the decree cannot be supported as to the matters complained of. The appeal, I think, must be allowed, and the decree altered accordingly, but I think there should be no costs of the appeal.

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* KEENAN *v.* HANDLEY. * 283

1864. July 6. Before the LORDS JUSTICES.

Communications took place between a bachelor and his kept mistress as to a discontinuance of the cohabitation, and in the course of these communications the woman uniformly asserted that he had promised to marry her, which assertions there appeared to be a fair prospect of her being able to substantiate. Ultimately the man proposed by letter that they should separate, he allowing her an annuity, which offer she accepted. *Held*, that this was a contract for valuable consideration, which could be enforced against the man.[1]

THIS was an appeal by the defendant from a decree of Vice-Chancellor KINDERSLEY, directing specific performance of an agreement by the defendant to grant an annuity of 150*l.* for the benefit of the plaintiffs, Ellen Keenan and her daughter.

The plaintiff Ellen Keenan, shortly before the year 1860, went to live with the defendant as his mistress, and in October of that year was delivered of a child, the infant plaintiff, of whom the

[1] That a consideration may be proved which is not expressly named in a contract, see 1 Sugden V. & P. (8th Am. ed.) 158, note (*b*); Goward *v.* Waters, 98 Mass. 596, 599; Townend *v.* Toker, L. R. 1 Ch. Ap. 459; 2 Dart V. & P. (4th Eng. ed.) 695. As to considerations founded on the compromise or giving up of doubtful or disputed claims, see Chitty Contr. (11th Am. ed.), 46–48; 1 Story Eq. Jur. § 131; Leach *v.* Fobes, 11 Gray, 506; Baylies *v.* Payson, 5 Allen, 473; Lucy's Case, 4 De G., M. & G. 356 and note (1), 364, 365 and note (*a*); Stewart *v.* Stewart, 6 Cl. & Fin. (Am. ed) 911 and note (1), 967, note (1).

defendant was the reputed father. The defendant was a bachelor, and the case made by the bill was that he repeatedly promised to marry her. There was a conflict of evidence as to whether he had ever, in fact, made such a promise, the defendant positively denying that he had, but the balance of testimony appeared to be in favour of his having done so.

In the following year the subject of a discontinuance of the cohabitation was discussed. The plaintiffs alleged that the plaintiff Ellen Keenan refused to continue to live with the defendant unless he would marry her, though the result of the evidence appeared rather to be that the defendant was desirous of getting rid of the connection. It was, however, undisputed that throughout the course of these discussions the plaintiff Ellen Keenan insisted that the defendant had promised to marry her. Ultimately, on the 15th of October, 1861, the defendant wrote to her a letter, of which the material part was as follows: —

* 284 "Since I have been here, I have been thinking * seriously of what took place the other night, and the more I think of it the more convinced I am that it will be utter ruination to your happiness and mine if we were to marry; and it is not without a great struggle and pain to my feelings, that I have come to the conclusion that a parting between us is necessary. Such being the case, I feel the sooner the step is taken the less painful it will be for both of us; at the same time, you know me well enough to be sure that I shall not part with you and my child without doing every thing in my power to make you happy and comfortable. The thing I propose is this, that you should take a cottage in the country, where you can live comfortable with my child; and I will allow you 150*l.* a year, to be continued to you while you live alone and to our child after your death, should she survive you. I think that Devonshire, being your own county, will be best for you, and if you like to go there, I will furnish your cottage for you. Now, dear Nelly, do think seriously over this, and see if it is not the best for both of us. I will always be a friend to you. Do let me hear as soon as possible what you think; and if you wish advice, consult Starling, and I will see him if you like."

The plaintiff Ellen Keenan accepted this offer, and the cohabitation ceased. The defendant then gave instructions to Mr. Star-

ling, the solicitor named in the letter, to prepare deeds for carrying the arrangement into effect. Mr. Starling accordingly prepared two deeds, by one of which the defendant was to covenant to pay Ellen Keenan an annuity of 100*l.* for her life, and she was to release him from all claims, except the claims arising under the deeds. By the other deed, the defendant was to covenant to pay 50*l.* a year for the benefit of the daughter, and if she survived the mother, then an annuity of 150*l.* a year for her life. These deeds were * approved on behalf of Ellen Keenan, but the * 285 defendant refused to execute them, and in April, 1862, discharged Mr. Starling from being his solicitor.

In the following month the present bill was filed, praying that the defendant might be decreed specifically to perform the agreement contained in the letter of the 15th of October, 1861, and that the deeds already prepared, or such other deeds as the Court should think fit, might be executed for the purpose.

Vice-Chancellor KINDERSLEY, before whom the cause was heard, considered that although the plaintiff might have a right of action, still the agreement was of such a description as to make it proper to apply to a Court of Equity if a valuable consideration was shown, inasmuch as in every action for arrears it would be necessary to prove the consideration, but a Court of Equity, if there was no agreement to execute a deed but only an agreement to pay, would make an order for payment not only of arrears but of the future instalments as they became due. As to consideration his Honor, after an elaborate investigation of the evidence, came to the conclusion that the defendant had verbally promised to marry the plaintiff, and that, at all events, she would, in an action, have a fair chance of proving such a promise, so that the release of all claims in respect of the promise was a valuable consideration. His Honor accordingly made a decree in the plaintiff's favour with costs, directing proper deeds to be executed for securing the annuity and releasing the defendant from all other claims by the plaintiff. The defendant appealed.

Mr. Glasse and *Mr. Hemings*, in support of the decree. — Upon the evidence there was a promise to marry, and the giving up the right of action arising from this promise * was a * 286 good consideration. After what had passed an affiliation order could not have been obtained under 7 & 8 Vict. c. 101.

Smith v. *Roche*. (*a*) Even if there never was a promise of marriage, there was a *bonâ fide* dispute as to such a promise having been made and a plausible ground for contending that it had been made, and the giving up of all claim thence arising is a valuable consideration and supports the agreement, though not expressly mentioned in it. *Clifford* v. *Turrell*. (*b*) The assistance of a Court of Equity is necessary, for the annuity could not safely be sued for at law if not granted by deed. *Parker* v. *Rolls*. (*c*)

Mr. Baily and *Mr. Toulmin*, for the defendant. — The evidence does not establish the fact that there ever was a promise of marriage, and the case of buying off all demand on the ground of the allegation of a promise is not on the pleadings. The remedy is only by action even if there is a valuable consideration, for the letter contains nothing but a promise to pay, no promise to grant or secure an annuity. *Parker* v. *Rolls* does not decide that an action will not lie in such a case as the present if a valuable consideration can be made out. At all events, the plaintiff's going into the country is a condition precedent, and has not been fulfilled.

The Lord Justice Knight Bruce. — If the letter of the 15th of October, 1861, was founded on valuable consideration, there is no other question in the case. There being no allegation that the promise contained in that letter was unfairly obtained, the
* 287 plaintiff, * if there was valuable consideration, is entitled to the assistance of a Court of Equity to enable her to obtain what was promised. Was it then founded on valuable consideration? In order to determine this question, it is not, in my judgment, necessary to enter minutely into the point as to the comparative degree of credit due to the contradictory statements of the lady and of the gentleman. It is, upon the materials before us, clear that they lived together and had a child. He seems afterwards to have become tired of her, and more desirous to leave her than she was to leave him, as I believe is often the case. She, during the communications which took place on the subject of a separation, asserted that he had promised to marry her; he sometimes denied it; sometimes did not; but being determined on a

(*a*) 6 C. B. (N. S.) 223.
(*b*) 1 Y. & C. C. C. 138.
(*c*) 14 C. B. 691.

separation, he at last wrote the letter in question, and he must be taken to have admitted in it that a promise of marriage admitted or denied, or not admitted or not denied, had been a subject of discussion. He says in substance, "Whether I promised or not, let me hear no more of it, and I will give you 150*l.* a year," — and the offer thus made was accepted. I am of opinion that this is a contract for value. If it were material to decide whether any promise of marriage had ever been made, I should be inclined to come to the conclusion that the defendant, under gentle pressure, had sometimes made such a promise, though without any intention of performing it; but it appears to me to be clear, beyond any reasonable doubt, that the question whether such a promise had not been made was the subject of discussion, and that there was reasonable ground for thinking that the fact of such a promise could be proved. I agree, therefore, in the conclusion of the Vice-Chancellor.

The Lord Justice TURNER concurred.

*Some discussion then took place as to whether the *288 decree should direct payment of the annuity or the execution of a deed to secure it. Counsel for the defendant preferring the latter form, the execution of a deed was ordered.

AVELINE *v.* MELHUISH.

1864. July 6. Before the LORDS JUSTICES.

A trustee holding a fund in trust for three children allowed their father to receive the income of their shares during their respective minorities, considering him to be unable to maintain them. Two of the children attained twenty-one in the father's lifetime, and received their shares of the capital. The father died bequeathing his property to the three children equally, and appointing the trustee his executor. The youngest child attained twenty-one soon after his death, and within a few weeks received her share of the capital of the trust fund, and signed a receipt expressing her approbation of the mode in which the income had been applied during her minority. About half a year afterwards she and her two sisters received their shares of the father's estate and gave a release by deed to the trustees. After this she

filed a bill to charge the trustees with the dividends accrued on her share of the trust fund during her minority. *Held*, that after having, with a knowledge of the facts, received from the trustee her share of her father's estate, which was primarily liable to the claim, and given him a release, she could not maintain the claim against him.[1]

THIS was an appeal by the defendant John Melhuish from a decree of the Master of the Rolls charging him with a breach of trust in having applied certain dividends for the maintenance of the plaintiff during her minority instead of accumulating them for her benefit.

A testatrix, who died in 1823, bequeathed a fund of 3600*l.* bank annuities to trustees upon trust to pay the dividends to Mrs. Aveline (the mother of the plaintiff) for her life, and after her death the trustees were to stand possessed of the fund and its subsequent income in trust for all the children of Mrs. Aveline who should attain twenty-one, or die under that age leaving issue, share and share alike. The testatrix directed that the income of each child's presumptive share, after the death of Mrs. Aveline until such share became transferable, should be accumulated and go with the capital.

*289 *Mrs. Aveline died in June, 1841, leaving her husband surviving, and three daughters, of whom the plaintiff was the youngest, having been born only a few days before her mother's death. In 1846 the defendant Melhuish became the sole surviving trustee.

In February, 1847, Melhuish transferred the trust fund, which then consisted of 4121*l.* 12*s.* 6*d.* bank annuities, into the joint names of Mr. Aveline (the husband) and himself. He did so under the impression that Mr. Aveline had been duly appointed a trustee, which, however, did not appear to have been the case.

From the time of this transfer, the dividends on the 4121*l.* were received by Mr. Aveline, and expended in the maintenance of himself and his three children until the eldest attained twenty-one, in March, 1853, when one-third of the fund was transferred to her. On the 20th of January, 1857, the second daughter having attained twenty-one, another one-third of the fund was transferred to her.

[1] See Farrant *v.* Blanchford, 1 De G., J. & S. 107, and note (1), 120, note (1), and cases cited; Lloyd *v.* Attwood, 3 De G. & J. 614; Montmorency *v.* Devereux, 7 Cl. & Fin. (Am. ed.) 188, and note (1); Lewin Trusts (5th Eng. ed.) 663, 664; Perry Trusts, § 851.

The dividends of the remaining one-third were received by the father until his death, in February, 1862.

Mr. Aveline, by his will, left his property in equal shares to his three daughters, and appointed the defendant Melhuish his executor.

On the 17th of June, 1862, the plaintiff attained the age of twenty-one years.

On the 1st of July, 1862, the remaining one-third of the 4121*l.* stock was transferred into the plaintiff's name, and she signed the following acknowledgment: —

"I hereby acknowledge to have had transferred this day into my name the sum of 1373*l.* 17*s.* 6*d.* 3*l.* per * cent * 290 reduced annuities, being my portion or one-third part of the sum of 4121*l.* 12*s.* 6*d.* hitherto standing in the names of P. W. Aveline and J. Melhuish, Jr., as trustees under the will of my godmother Ann Plucknett; the interest or dividends arising from the said sum of 1373*l.* 17*s.* 6*d.* having been, during my minority, received by my father the said P. W. Aveline to the time of his decease, and lastly by the said J. Melhuish, and applied for my maintenance and education. And I subscribe my name to this memorandum in discharge of all further claims on the estate of the said P. W. Aveline and J. Melhuish, Jr., in respect of this my said portion of 1373*l.* 17*s.* 6*d.* reduced annuities."

After this, Melhuish, as executor of Mr. Aveline, divided between the plaintiff and her sisters the residuary estate of Mr. Aveline, except a sum of 700*l.* 3*l.* per cents which was retained to answer an annuity; and on the 19th of December, 1862, they executed and gave to him a release by deed discharging him from all liabilities as executor.

In March, 1863, the plaintiff put forward the claim that the dividends on her share ought to have been accumulated; and in June, 1863, filed her bill praying that the defendant Melhuish might be decreed to make good the amount of stock which would have been produced by accumulating the income of her share of the 3600*l.* stock; and that if the memorandum of the 1st July, 1862, amounted to a release, it might be set aside, except as to its effect as a receipt for the 1373*l.* 17*s.* 6*d.*, which the plaintiff admitted that she had received.

The defendant Melhuish, by his answer, stated that Mr. Aveline was not of ability to maintain his children, for that for
* 291 some time before his death his income was * barely 100*l.*

The defendant submitted that, under these circumstances, the dividends were properly applied for maintenance, notwithstanding the trust for accumulation. He also relied on the memorandum of the 1st of July, 1862, the receipt by the plaintiff of her share of her father's estate, and the release of the 19th of December, 1862.

The Master of the Rolls held that the memorandum of the 1st July, 1862, was no defence to the suit, the plaintiff not having had sufficient advice when she signed it, and that Melhuish was liable to make good the fund which would have been produced by accumulating so much of the income of the plaintiff's share as he could not show to have been properly expended in her maintenance; and with this view his Honor directed an inquiry as to the father's ability to maintain his children. The defendant Melhuish appealed.

Mr. Southgate and *Mr. Bedwell*, in support of the decree.

Mr. Selwyn and *Mr. Karslake*, for the appellant. — The plaintiff settled the accounts of her father's estate with the executor and released him from all demands in respect of it. If the dividends were properly applied for maintenance, the plaintiff has no claim in respect of them; if they were not properly applied, the father's estate is, as between it and Melhuish, primarily liable, and the release of that estate takes away the secondary liability.

Rackham v. *Siddall*, (*a*) *Greenwood* v. *Wakeford*, (*b*) and *Hope* v. *Liddel*, (*c*) were referred to.

* 292 * *Mr. Southgate*, in reply. — The plaintiff could not know that the release would affect this claim, and there is no allegation that she knew the law that the income of a child's fortune is not applicable for maintenance, except when the father is not of ability to maintain her.

THE LORD JUSTICE KNIGHT BRUCE. — I am of opinion, that the

(*a*) 16 Sim. 297; 1 Mac. & G. 607.
(*b*) 1 Beav. 576.
(*c*) 21 Beav. 183.

acknowledgment of the 1st of July, 1862, and the deed of release of the 19th of December, 1862, render it incumbent on the Court to dismiss the bill at once.

[THE LORD JUSTICE TURNER. — The plaintiff's case rests entirely on the direction to accumulate the dividends. The defendant Mr. Melhuish, in 1846, became the sole surviving trustee. The plaintiff was then an infant, and her father assumed the character of trustee. Mr. Melhuish, treating him as having the character which he had thus assumed, transferred the trust fund into the joint names of himself and the father. From that time the dividends, instead of being accumulated, were received by the father and applied by him for the maintenance of the children. If he was not of ability to maintain his children, the dividends were properly applied for their maintenance,[1] notwithstanding the trust for accumulation, for the gift over, having, in the events which have happened, become incapable of taking effect, does not appear to me to affect the case. In this state of circumstances, if there had been nothing more in the case, I apprehend that it would have been of course to direct an inquiry as to the father's ability to maintain his children; but in this case, as it comes before us, there are two points to be considered, first, what is the result
* of the evidence as to the father's ability to maintain his * 293
children; and, secondly, what is the effect of the plaintiff's conduct after attaining twenty-one. The defendant, by his answer, states that the father was not of ability to maintain his children without the dividends of this fund, for that his income apart from those dividends was barely 100*l*., and he adds, that the plaintiff knew all along that the dividends were so applied. Upon the facts appearing in the answer, I think that the father, during some time at least, was not of ability to maintain his children, though I think that further evidence would be necessary before we could, on that ground alone, dispose of the case without directing an inquiry.

Now as to the plaintiff's conduct: what are the circumstances? She attained her majority on the 17th of June, 1862. On the 1st of July her share of the capital fund was transferred into her name, and she signed this memorandum. [His Lordship read the memorandum.] The objection to that memorandum being taken

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1358, and note (4), and cases cited, 1359, and note (6).

as an effectual release is, that it was signed by the plaintiff within a fortnight after her attaining twenty-one; and for that reason I do not think that it can be relied upon as any thing more than evidence that the young lady knew what had been done. Now if the dividends had been improperly applied, the father's estate was liable to make them good, for he had assumed the office of trustee; and not only so, but, as between himself and his co-trustee, he was the person primarily liable for them. Then more than six months after attaining twenty-one the young lady receives her share of her father's estate, and executes a release by which she discharges the executor from all claims and demands in respect of her father's estate. By this she materially altered the position of the trustee, for had her claim in respect of the dividends
* 294 *been brought forward earlier, the trustee could have exercised his right of retaining out of the father's estate whatever might be found due. By her conduct she has precluded him from this remedy, and having, with a full knowledge of the facts, received from him her share of her father's estate, and released him, she cannot now maintain this claim against him. It has been argued that she did not know her rights; but the deed of release operated as a discharge, and this bill does not impeach it. The bill must be dismissed, and, if my learned brother agrees, with costs.

JONES *v.* JONES.

1864. July 27. Before the LORDS JUSTICES.

The official manager of a company made an application in a suit attached to another branch of the Court. The application was refused with costs, and the order refusing it contained a declaration that the costs of the official manager ought not to be paid out of the estate of the company. *Held*, that there was no jurisdiction to make such a declaration, and that it must be struck out, the question whether these costs ought to be allowed out of the estate of the company being for the decision of the Judge to whose Court the winding-up was attached.

THIS was an appeal motion by the official manager of the British Provident Life and Fire Assurance Company.

The suit was a suit by residuary legatees to administer the

estate of a Mr. Jones, who had been the holder of 500 shares in the company. On the 11th of May, 1864, the chief clerk of Vice-Chancellor STUART made his general certificate, not taking any notice of a claim made by the official manager against the estate in respect of Mr. Jones's liability as shareholder to a call made under the winding-up. On the 10th of June, 1864, an order was made on further consideration. On the 16th of June, 1864, Vice-Chancellor KINDERSLEY, in whose Court the winding-up of the company was being carried on, made an order giving the official manager leave to take * such proceedings as he might be * 295 advised to stay the distribution of Jones's estate. The official manager accordingly made an application to Vice-Chancellor STUART in the cause for the purpose of having the claim reconsidered, and of staying the drawing up of the order on further consideration till the point had been decided. Vice-Chancellor STUART refused the application with costs, and added to his order a declaration that the costs ought not to be allowed out of the estate of the company. The object of the present motion was to strike out this declaration, the Vice-Chancellor KINDERSLEY having expressed an opinion, that while it was in force he could not allow the official manager these costs in the winding-up.

Mr. Bacon and *Mr. Karslake*, for the appeal motion, having opened the case, were stopped by the Court, who called upon the counsel to the parties in the cause upon the question whether the Vice-Chancellor STUART had jurisdiction to make the declaration.

Mr. Malins and *Mr. C. C. Russell*, for the executors of Mr. Jones, and *Mr. Greene* and *Mr. George Lake Russell*, for the plaintiffs, contended that it was competent to the Vice-Chancellor STUART to make a declaration expressing his judgment on the impropriety of proceedings taken before him. They urged that it was unreasonable that the executors of Mr. Jones, in their character of contributories, should have to contribute towards costs incurred in a proceeding which had been decided to have been improperly taken against themselves.

THE LORD JUSTICE KNIGHT BRUCE. — In this case a judicial declaration of opinion has been * pronounced by one of * 296 the learned Vice-Chancellors as to a matter not within his

jurisdiction, but within the jurisdiction of another of the Vice-Chancellors. Assuming the declaration to be right upon the merits, I think that there was no jurisdiction to pronounce it, and that it ought, therefore, to be discharged. I do not express any opinion as to the merits of the question to be decided by the Vice-Chancellor KINDERSLEY.

THE LORD JUSTICE TURNER. — If the expression of opinion in the declaration now before us was extra-judicial, it ought not to have been embodied in the order; if it was judicial, I think that there was no jurisdiction to make such a declaration. If the estate of Mr. Jones is injured by reason of the costs in question being paid out of the estate of the company, the Vice-Chancellor to whose Court the winding-up is attached can make such order as will meet the justice of the case. I think that the Vice-Chancellor STUART had no jurisdiction to give any judicial opinion as to the mode in which costs ought to be dealt with in the course of the winding-up, and that the remedy of Mr. Jones's estate as to these costs, if improperly incurred by the official manager, is under the winding-up. Without giving any opinion on the merits, which are to be dealt with by the Vice-Chancellor KINDERSLEY, I am of opinion that the declaration in question ought to be struck out of the order.

1864. May 30, 31. July 28. Before the LORDS JUSTICES.

Under a submission to arbitration containing no provision for making it a rule of Court, an award was made in June, 1859, finding a sum due from S. to W. In December, 1859, W. brought an action on the award, to which S. pleaded *nul tiel agard*, and adduced in support of the plea evidence that the arbitrators had made their award according to the opinion of a third party, and not their own.[1] A verdict was found for S., the defendant at law, leave being reserved to W. to move to have it entered for him. In June, 1860, the Court of Exchequer discharged a rule *nisi* which had been obtained for that purpose, but in December, 1861, the Court of Exchequer Chamber reversed

[1] See Anderson *v.* Wallace, 3 Cl. & Fin. 26; Hoproft *v.* Hickman, 2 Sim. & Stu. 130.

this decision on the ground that the above defence was not available by way of plea. In March, 1862, S. filed his bill to set aside the award and to be relieved against the judgment. Vice-Chancellor WOOD held, that as the submission did not contain any agreement that it might be made a rule of Court, and as it never had been made a rule of Court, the Court had jurisdiction; that if the matter had been fresh the award must have been set aside, and the Court had still jurisdiction to do so, but that as the plaintiff might have made the submission a rule of Court and set aside the award at law on the grounds now urged, but had allowed the time for so doing to elapse, this Court ought not to interfere, unless in a strong case: and his Honor being disposed to the view that the arbitrators had, however irregularly, come to a correct conclusion, dismissed the bill.

Held, by the Lord Justice KNIGHT BRUCE, that the plaintiff must by his course of conduct be taken to have elected to defend himself against the award by defending the action and to abandon all other modes of opposition; that he must therefore abide by the result of the action, and that the bill had been properly dismissed.[1]

Held, by the Lord Justice TURNER, that where a submission to arbitration has not been made a rule of Court and contains no agreement that it may be made a rule of Court, the jurisdiction of equity to set aside the award is unaffected by the statutes; that the plaintiff's conduct in the present case had not been such as to debar him of his right to resort to a Court of Equity; that the Court had no jurisdiction to inquire whether the award was right or wrong, and that the plaintiff ought to have had relief on the ground of the invalidity of the award.

THIS was an appeal by the plaintiff from a decision of Vice-Chancellor WOOD, (*a*) who had dismissed the bill.

On the 23d of June, 1856, the plaintiff and the defendant Bain-

(*a*) 1 Hem. & M. 576.

[1] See Glastenbury *v.* McDonald, 44 Vt. 450. It has been held in Massachusetts that a bill in equity will not lie to set aside an award where all the objections to it are open to the party by way of defence to an action at law upon it. Mickles *v.* Thayer, 14 Allen, 114. (See also Ferson *v.* Drew, 19 Wis. 225; Meloy *v.* Dougherty, 16 Wis. 269.) In a later case, where the question of jurisdiction was waived, the Court set aside an award, although it was assumed that the plaintiff might have availed himself of the objections to it at law. Parker *v.* Clark, 104 Mass. 431. The equity jurisdiction over awards is ancient and well established; but it will not be exercised in case of awards, which, by agreement, are made rules of any Court. The Court in which the rule is entered has authority to deal with the award, and must exercise it. West Jersey Railroad Co. *v.* Thomas, 6 C. E. Green (N. J.), 205. As to the jurisdiction in equity over awards; see farther, Adams Eq. (5th Am. ed.) 191, 192 *et seq.*; 2 Story Eq. Jur. § 1450 *et seq.*; Shepherd *v.* Briggs, 28 Vt. 81; Wakefield *v.* The Llanelly Railway and Dock Co., 3 De G., J. & S. 11; Eads *v.* Williams, 4 De G., M. & J. 674; Morse on Arb. and Aw. 321, 618–620.

brigge, who had for a few months carried on business in partnership as brewers and maltsters in Prussia, entered into an agreement for dissolution of the partnership. The concern was accord-
* 298 ingly wound up in * December, 1856, but the accounts were not finally settled. The defendant Bainbrigge afterwards obtained an order for protection from the District Court of Bankruptcy at Birmingham and the defendant Whitmore was appointed official assignee to act in the matter of the petition.

The plaintiff carried in a claim against Bainbrigge's estate, alleging a balance to be due to him. The defendants alleged that the balance was on the other side, and ultimately the accounts were referred to arbitration by the following agreement made in August, 1858, and sanctioned by the Court of Bankruptcy: —

"In the Matter of a private Arrangement of Mr. Wm. Henry Bainbrigge. — It is agreed that the accounts between Mr. Wm. Henry Bainbrigge and Mr. Gilbert Smith shall be taken by Mr. John Percival, of Birmingham, and Mr. Samuel Daniell, of the same place, and the balance ascertained; that neither party shall be at liberty to reopen the accounts, and that any balance found due from Mr. Bainbrigge shall be provable upon his estate, and that any balance found due from Mr. Smith shall be recoverable by the trustee or trustees under the said petition for a private arrangement, the transactions of Mr. James Smith to be considered as the transactions of Mr. Gilbert Smith, and in case of any disagreement between the above accountants, they shall have power to nominate an umpire."

The arbitrators appointed a Mr. Rotton as their umpire. He at first declined, saying that it would take up too much of his time. They represented to him that his services would not be much required, and he agreed to act on the footing that he was to be consulted on points arising under the reference as to
* 299 which the arbitrators * felt a difficulty, but that he was not to be called upon to attend the meetings, nor to hear evidence, nor to do more than advise the arbitrators on points on which they felt a difficulty. It appeared that this arrangement was agreed to by the plaintiff's solicitor.

Several meetings took place before the arbitrators, and they were attended by the solicitors for the parties in the usual way.

On three occasions the arbitrators differed in opinion, and they on each of such occasions referred the matters in question to Rotton in the absence of the parties. On one occasion, after the meetings had been closed, the arbitrators felt a difficulty upon certain points practically involving the main question in dispute (the allowance or disallowance of a claim amounting to about 5000*l.*), and it appeared that they had not attempted to discuss the matter between themselves, but had agreed at once to be bound by the opinion of Rotton.

It further appeared that Mr. Morgan, the solicitor for the plaintiff, had met one of the arbitrators in the street, and then and there told him that he (Morgan) objected to the matters in question being submitted to Rotton, unless he were attended by the solicitors of the parties and had the points duly argued before him, but the arbitrators, notwithstanding such objection, went by themselves before Rotton and took and acted upon his opinion.

On the 9th June, 1859, the arbitrators made their award, finding that there was due from the plaintiff to the defendant Bainbrigge or his assignee the sum of 364*l.* The defendant Whitmore, in December, 1859, by leave of the Court of Bankruptcy, brought an action in the Court of Exchequer upon this award, to which * the plaintiff pleaded *nul tiel agard*, and issue was * 300 joined.

This issue was tried at the Staffordshire Spring Assizes, 1860, before Mr. Baron BRAMWELL, and a verdict was entered for the defendant at law, leave being reserved to the plaintiff at law to move to set aside that verdict, and instead thereof to enter a verdict for himself for the sum of 364*l.* A rule *nisi* to enter the verdict for the plaintiff was obtained; and on the 5th of June, 1860, the plaintiff in equity showed cause against the rule, and, after argument, the rule was discharged by the Court of Exchequer. (*a*)

The defendant Whitmore appealed from this decision to the Court of Exchequer Chamber; and on the 2d of December, 1861, that Court reversed the decision of the Court below, and directed a verdict to be entered for the plaintiff at law, (*b*) on the ground that the case made by the defendant at law was not available under his plea.

(*a*) 5 H. & N. 824. (*b*) 7 H. & N. 509.

On the 7th of March, 1862, the plaintiff filed his bill to set aside the award and be relieved against the judgment, on the ground that the award was not really the award of the arbitrators, who had improperly treated the opinion of Rotton as binding on them. The Vice-Chancellor Wood dismissed the bill, and the plaintiff appealed.

Mr. Rolt, *Mr. Hobhouse*, and *Mr. Druce*, for the plaintiff. — There are two questions to this case, whether, in the cir-
* 301 cumstances, the jurisdiction of a Court of Equity to * set aside an award for misconduct of the arbitrators is excluded; and secondly, whether there has in this case been such misconduct in the arbitrators as to be a sufficient ground for setting aside the award. The Vice-Chancellor was in our favour on both points; but his Honor came to the conclusion that the award was substantially right, and mainly on that ground dismissed the bill. We contend that, even after judgment at law, relief may be had in equity upon any ground of equitable relief which is not available at law. In a case not coming within the statutory jurisdiction, a Court of Law has no power to set aside an award, and a person who feels himself aggrieved by it cannot take any proceeding for that purpose, he can only defend an action; and the present case shows that circumstances, which would clearly enable a Court of Equity to set aside an award, cannot be set up at law under a plea of no such award; and *Dresser* v. *Stansfield* (*a*) shows that they cannot be pleaded specially. The result is, that, except in cases coming within the statutory jurisdiction, there is no defence at law on the ground of misconduct of the arbitrators. The judgment may be set aside in equity if there are equitable grounds not available at law. *Harrison* v. *Nettleship*. (*b*) Where there is concurrent jurisdiction, a person who lets a case go on to judgment at law cannot afterwards resort to equity, but he may come into equity before judgment. If, however, there is no concurrent jurisdiction at law, he may come into equity at any stage. *Davies* v. *Stainbank*. (*c*)

[The Lord Justice Knight Bruce here observed, that there was no judgment in that case, only a verdict.]

(*a*) 14 M. & W. 822.
(*b*) 2 M. & K. 423.
(*c*) 6 De G., M. & G. 679.

We submit that no distinction can be founded on that; the principle is, that if there is concurrent jurisdiction *at law, * 302 a party cannot take his chance at law, and come into equity only when he finds that the case has gone against him. In *Thornton* v. *M'Kewan* (*a*) there was a judgment. Now, as regards the statutory jurisdiction under 9 & 10 Will. 3, c. 15, nothing comes within it unless there be an agreement that the submission may be made a rule of Court. If there be such an agreement, the jurisdiction of equity is excluded: *Heming* v. *Swinnerton*; (*b*) and a Court of Law has jurisdiction to set aside the award, but in no other case. The Bankrupt Law Consolidation Act (12 & 13 Vict. 106, § 153) gives assignees power to submit disputes to arbitration; and sect. 154 authorizes the making the submission a rule of Court, but it contains nothing to give a Court of Law jurisdiction to set aside an award where the submission has not been made a rule of Court. The Stat. 17 & 18 Vict. c. 125, § 17, provides that every agreement of reference may be made a rule of Court, and excludes the jurisdiction of equity if it is made so. Now this agreement never was made a rule of Court, and the filing a bill would prevent any application to make it one. The plaintiff is in no default, he considered that he need not apply to set aside the award, for that he could not defend himself at law; and the Court of Exchequer held that his view was right. A Court of Common Law could not set aside the award under the old statute, nor under the Bankruptcy Act. Then as to the Common-Law Procedure Act: that Act only says that a submission may be made a rule of Court; it is only permissive, and in the present case, the submission not having been made a rule of Court, the jurisdiction of equity is not excluded. It was urged by the defendants below, that this Court will, in dealing with agreements under the Common-Law Procedure *Act, act * 303 by analogy to the Stat. 9 & 10 Will. 3, c. 15. The Vice-Chancellor asked for authority, but none could be furnished; it was only said that, in references under an order at *nisi prius*, the Courts of Common Law have acted by analogy to that statute, but cases of proceedings in a pending action cannot furnish any analogy; and in *Rogers* v. *Dallimore* (*c*) a Court of Common Law refused to act in analogy to the statute. *Thornton* v. *M'Kewan* (*a*)

(*a*) 1 H. & M. 525.
(*b*) 2 Phill. 79.
(*c*) 6 Taunt. 111.

lays down the general rule on which we rely as to interference with a judgment at law, in terms which we only qualify by admitting that, if there is concurrent jurisdiction at law, the judgment at law is conclusive. There was here a delegation of authority by the arbitrators, which is clearly sufficient to set aside the award. *Eads* v. *Williams*, (*a*) *Eastern Counties Railway Company* v. *Eastern Union Railway Company*. (*b*) The Vice-Chancellor appeared to rely on *Fetherstone* v. *Cooper*, (*c*) and *Chuck* v. *Cremer*, (*d*) but the former case was within the Stat. 9 & 10 Will. 3, c. 15, and the agreement had been made a rule of Court, and in the latter, the reference was under an order at *nisi prius*, and only error was alleged without any equity. The Vice-Chancellor went into the merits, and exercised a discretion in refusing to interfere; but we submit that the case does not depend on discretion, but on strict right. At common law there was no remedy for corruption in an arbitrator. *Wills* v. *Maccarmick*; (*e*) but the principle of equity is, that no person shall be allowed to derive a benefit from the fraud of another, and there is no room for discretion. In *Fetherstone* v. *Cooper* the Court had a discretion, the case being one of an interlocutory application.

* 304 * *Mr. Amphlett*, *Mr. Dowdeswell*, and *Mr. Prendergast*, for the respondent. — We submit that the Court has no jurisdiction, and that if it has, it is in the discretion of the Court whether it is to be exercised, and that, in the circumstances of this case, the Court will not exercise it, substantial justice having been done. The Vice-Chancellor thought that there was jurisdiction, and that the case was not within the Stat. 9 & 10 Will. 3, c. 15. We submit that it is within that statute. By 17 & 18 Vict. c. 125, § 17, either party may make an agreement of reference a rule of Court. When, therefore, parties refer to arbitration, they must be taken to have agreed that either party may make the reference a rule of Court. It has been urged, that the Stat. 9 & 10 Will. 3, c. 15, is compulsory, and that the Common-Law Procedure gives an option, but the optional becomes compulsory if either party chooses. In *Heming* v. *Swinnerton*, (*g*) the case was considered to be within the Statute 9 & 10 Will. 3, c. 15, though the

(*a*) 4 De G., M. & G. 674.
(*b*) 2 New Rep. 538, L. J.
(*c*) 9 Ves. 67.
(*d*) 2 Phill. 477.
(*e*) 2 Wils. 148.
(*g*) 2 Ph. 79.

agreement was only that at the instances of either party the reference might be made a rule of Court. *Davis* v. *Getty* (*a*) supports our contention. But if the case is not strictly within 9 & 10 Will. 3, c. 15, the Court will follow the analogy of that statute. The Courts of Law act in analogy to the statute in cases not coming strictly within it, and this Court also will do so. The rule at common law and here ought to be the same in this respect. *Harding* v. *Wickham.* (*b*) There is no case to be found in which, where an agreement might have been made a rule of Court, this Court has interfered after the time limited by the statute. The Act having provided a convenient and summary mode of pro-

cedure, the Court will not allow a bill to be filed. * There * 305 has been a discussion of the rights at law and a judgment upon them, and there being no independent equity, the Court will not allow the matter to be reopened. If a Court of Law has concurrent jurisdiction and decides, this Court cannot afterwards give relief; and here there was concurrent jurisdiction, since a Court of Law can set aside an award under its statutory power if the submission is made a rule of Court.

Armitage v. *Walker* (*c*) was also referred to.

Mr. Hobhouse, in reply. — The case is not within the Act, the 17th section of the Common-Law Procedure Act excluding all notion of the jurisdiction of equity being ousted until the agreement has been made a rule of Court. As to the analogy of the statute, the Court will not by analogy apply the rules of a summary jurisdiction to a jurisdiction not summary. It is incontestable that a judgment may be set aside if there is an independent equity. The only argument urged to show that there is no equity here is, that the agreement might have been made a rule of Court, but that comes to nothing unless it can be shown that there was an obligation to make it a rule of Court.

Judgment reserved.

July 28.

THE LORD JUSTICE KNIGHT BRUCE. — The main question in this case is, whether Mr. Gilbert Smith, the plaintiff in equity, can

(*a*) 1 S. & S. 111. (*b*) 2 J. & H. 676. (*c*) 2 K. & J. 211.

be relieved in equity against a judgment at law obtained against him adversely and regularly in an action brought against
* 306 him * by Mr. Whitmore, one of the defendants in equity.

The original bill was filed on the 7th March, 1862. The action had been brought in December, 1859, and tried at the spring assizes of the year 1860, and the ultimate judgment at law obtained in the Exchequer Chamber in January, 1862. In the present instance all considerations belonging to cases of fraud or deceit, cases of trust and cases of accident are foreign to the contest. There is no trust. There has been neither fraud nor deceit nor accident. The judgment obtained in the Exchequer Chamber may possibly have proceeded on an erroneous view of the state of the common law, though I do not say that it did. But it was honestly obtained. There was no concealment, nor does Mr. Smith appear to have been ignorant of any material fact at the time when in 1860, the verdict in the action was given. There was, I believe, no application for a new trial. The verdict was for Mr. Smith, but was set aside by the Court of Exchequer Chamber, and that Court directed judgment to be entered against him, the judgment already mentioned, which seems to be conclusive at law, subject possibly to an appeal to the House of Lords. But there has not, I believe, been such an appeal. The action was brought upon an award. The complaint of Mr. Smith against the award, and therefore against the judgment in the Exchequer Chamber, is, that, as he alleges, the arbitrators acted erroneously in allowing a third person to guide and direct their opinion, not merely to advise them. This objection, however, if well founded, was available to Mr. Smith at law and in equity from the time of making the award, which was in June, 1859, that is to say, he might, in 1859, have filed a bill in equity to set aside the award, or might, in the same year, have proceeded at law for the same purpose.[1] But otherwise than by defending the action (with what ultimate success has been mentioned) and by filing this bill
* 307 now before us * (filed, I repeat, not before March, 1862), Mr. Smith, as I collect, has never in any Court of Law or Equity attacked or endeavoured to impeach or sought relief against the award in any shape or form, nor, I believe, has the submission to arbitration been made a rule or order of any Court, and he

[1] See Eads *v.* Williams, 4 De G., M. & G. 674, and note (4).

must, I think, for every present purpose, be taken to have elected to defend himself against the award by defending the action, and abandoned every other mode of opposition to the award. He has, I think, by his conduct lost his equity, if he ever had any, against the action and against the award, and, in my opinion, the bill, having been dismissed, ought so to remain.

THE LORD JUSTICE TURNER. — This is an appeal from a decree of Vice-Chancellor Sir WILLIAM PAGE WOOD, by which his Honor dismissed a bill to set aside an award on which a judgment against the plaintiff had been recovered at law, and my learned brother agreeing in the conclusion at which the Vice-Chancellor has arrived, the decree must, of course, be affirmed and the appeal dismissed. I confess, however, that, after having considered the case anxiously, and I may say the more anxiously from having felt great reluctance to disturb this award, I have been unable to bring my mind to the same conclusion as my learned brother and the Vice-Chancellor have arrived at. The Vice-Chancellor appears, from the notes of his judgment with which we have been furnished, to have proceeded partly upon the ground that the plaintiff who seeks to impeach the award might, as no doubt he might, at any time have made the agreement to refer a rule of a Court of Common Law, and, having done so, have proceeded at law to set aside the award on the grounds on which it is impeached by this bill, no purely equitable ground for setting aside the award being alleged by the bill, and * partly upon the ground that, looking behind the award into the merits of the case, the plaintiff has no reasonable ground of complaint, and his Honor has relied upon the cases of *Cooper* v. *Fetherstone* (*a*) and *Chuck* v. *Cremer* (*b*) as warranting the dismissal of the bill upon these grounds. My learned brother's opinion, as I collect, is, that the plaintiff has by his conduct lost any equity which he may have had against the action and against the award. * 308

Now, looking at the case independently of authority, it cannot be denied that there has at all times been jurisdiction in this Court to set aside awards,[1] nor, as I think, can it be contended that the fact of exclusive jurisdiction having been given to Courts of Law to set them aside in certain cases and under certain circumstances

(*a*) 9 Ves. 67. (*b*) 2 Ph. 477.

[1] See cases cited *ante*, 297, note (1).

can take away the original jurisdiction of this Court in cases in which those powers have not been invoked; and, although I am not prepared to say that there may not be cases in which the conduct of parties may have been such as to destroy their right to resort to the original jurisdiction of this Court, I think that the question whether that right has been destroyed or not must depend in each case upon its circumstances, and I do not think that in this case there has been any such conduct as would destroy the right, for the plaintiff seems to me to have done no more than this, that he waited until it was attempted to enforce the award against him, and that when this was attempted to be done by the action brought against him, he, under the advice of counsel, defended himself by a plea framed for the purpose of putting in issue the validity of the award, a plea which, it is to be observed, was recognized by the Court of Exchequer, although afterwards held by the Court
* 309 of Exchequer Chamber to * be unavailing. I cannot bring my mind to think that the plaintiff, by having adopted this course of pleading at law, and by not having applied to this Court until after this mode of pleading had been determined at law to be ineffectual, ought to be held to have debarred himself from the right to resort to this Court for relief, notwithstanding the judgment obtained against him at law.

It was argued for the defendants, that inasmuch as the agreement to refer might, by the Bankruptcy Act and by the Common-Law Procedure Act, have been made a rule of Court, the ordinary jurisdiction of this Court was excluded, and the case of *Heming* v. *Swinnerton* (*a*) was referred to on that point; but in that case, and other cases of that class, there was an agreement that the submission should be made a rule of Court, in effect, that the case should be governed by the jurisdiction under the statute; and I cannot go the length of holding that the mere existence of a power to make a submission a rule of Court is tantamount to an agreement that it shall be made so, or can of itself, independently of agreement, exclude the ordinary jurisdiction of this Court. To hold this would, as it seems to me, be in effect to hold that the ordinary jurisdiction of this Court to set aside awards was altogether abolished.

It was further argued for the defendants, that this case, not hav-

(*a*) 2 Phill. 79.

ing been brought within the Statute of Will. 3, by the agreement to refer having been made a rule of Court, this Court ought, as to the time within which a bill should be filed to impeach the award, to be guided by analogy to the rules which have been adopted at law as to the time within which motions must be * made * 310 to set aside awards not falling within the above statute; but I do not think this argument is entitled to any weight. It is one thing for a Court of Law, which has no jurisdiction to set aside an award otherwise than under the statute, to say that it will not interfere after the time when, if it had jurisdiction under the statute, it could have so interfered, and quite a different thing for this Court to say it will limit its original jurisdiction, which existed before the statute, by reference to that statute.

So far, therefore, as the plaintiff's title to relief is affected by his not having made the agreement to refer a rule of Court, or by his conduct, I do not think that this bill ought to have been dismissed; and looking still at the case independently of authority, I do not think that it was competent to the Court to dismiss the bill upon the merits of the case lying behind the award. Arbitrators are judges selected by the parties to examine into the merits. If they have acted fairly and properly, their award disposes of the case. If they have acted unfairly and improperly, their award cannot stand, and the merits of the case must, as it seems to me, be as open as if they had never been appointed.[1]

With reference to the cases referred to by the Vice-Chancellor, it does not seem to me that they warrant the dismissal of this bill. As to *Fetherstone* v. *Cooper*, (*a*) the case was before Lord ELDON upon an interlocutory application to dissolve an injunction, and he dissolved it, pointedly on the ground that it ought not to have been granted in the early stage of the cause at which it had been granted. The bill appears to have been filed at a time when the agree-

(*a*) 9 Ves. 67.

[1] As to the conclusiveness of awards, see cases cited in note (1) to Eads *v.* Williams, 4 De G., M. & G. 674; Morse Arb. and Aw. 293 *et seq.*; Sanborn *v.* Murphy, 50 N. H. 65; Johnson *v.* Noble, 13 N. H. 286; White Mountains Road *v.* Beane, 39 N. H. 107; Cushman *v.* Wooster, 45 N. H. 410; Rundell *v.* La Fleur, 6 Allen, 480; Myers *v.* York & Cumberland R.R. Co., 2 Curtis, 28; S. C., 18 How. (U. S.) 246; Whitmore *v.* Le Ballistier, 35 Maine, 488; Brown *v.* Clay, 31 Maine, 518; Burchell *v.* Marsh, 17 How. (U. S.) 344; Hodgkinson *v.* Fernie, 3 C. B. N. S. 189; West Jersey Railroad Co. *v.* Thomas, 6 C. E. Green (N. J.), 205.

* 311 ment to refer might have been, * but had not actually been, made a rule of Court of Law, and the case seems to decide no more than that the Court ought not to interfere by injunction at a time when the plaintiff had the means of relieving himself at law, if his case was well founded. It certainly does not go the length of deciding that where a plaintiff has the right of proceeding, either at law or in equity, he loses his right of proceeding in equity by not resorting to his right at law. And as to *Chuck* v. *Cremer*, (*a*) that also was a case of injunction granted upon interlocutory application; and I do not understand Lord COTTENHAM to have entered into the merits of the case with reference to the question whether the award was just or not. On the contrary, he distinctly disclaimed all jurisdiction over the question, whether the arbitrator was right or wrong in his decision; and, as I understand the case, he disposed of it on the merits quite independently of the award, and examined the merits with that view only.

I think it right to add, that I have felt no little difficulty upon the question whether this award might not well have been held to have been binding on the plaintiff, and this bill therefore properly dismissed, upon the ground that Rotton, although termed an umpire, was in truth no more than an adviser of the arbitrators, and was agreed by the parties to be and was so treated and considered; but looking to what was said in the Court of Exchequer, and to what has been said by the Vice-Chancellor upon this point, I do not feel bold enough to concur in supporting this decree on that ground.

* 312 For the reasons which I have given, I cannot concur * in the dismissal of this appeal; but my learned brother agreeing in opinion with the Vice-Chancellor that the bill ought to be dismissed, of course the decree must stand.

(*a*) 2 Phill. 477.

Ex parte HALLIDAY.

Re HALL AND JONES.

1865. June 24, 27. Before the Lord Chancellor Lord WESTBURY.

There can be no proof, under a deed of trust under the 192d section of the Bankruptcy Act, 1861, for damages on a contract, unless the contract was broken before the execution of the deed.

H. & Co. purchased a cargo, the buyers to name the port of delivery. On the arrival of the ship they declined to name the port of delivery, and signified their inability to perform the contract. The sellers therefore named the port and sold the cargo at a loss; but before this was done H. & Co. executed a deed of trust under the 192d section: *Held*, that the contract was still subsisting at the date of the deed, and that the sellers could not prove for the loss.[1]

THIS was an appeal from a decision of Mr. Commissioner PERRY, of the Court of Bankruptcy of the Liverpool district. The facts were brought before the Court in a special case, and were as follows:—

Messrs. Hall & Jones were brokers at Liverpool, and on the 17th of October, 1864, they executed a deed of assignment for the benefit of their creditors, which was, on the 10th of November, 1864, duly registered under the 192d section of the Bankruptcy Act, 1861.

On the 11th May, 1864, Messrs. Gray & Walker, brokers in London, sold, on behalf of Messrs. Halliday, Fox, & Co., merchants in London, to Hall & Jones a cargo of rice, which was expected to arrive by the Southern Rights.

The contract provided, that the cargo was to be deliverable over the ship's side at any good and safe port in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive, at the buyers' option, to be declared to the sellers on or before * the ship's arrival at the port of call in the Channel. * 313 The price to be 10*s.* 6*d.* per cwt. if delivered at London or Liverpool, or 10*s.* 4½*d.* if delivered at any other port. It was also provided, that the demurrage incurred by neglect of buyers in

[1] See *In re* Agra Bank, L. R. 5 Eq. 165.

giving sailing orders as above should be paid by them. There was a clause providing that any dispute as to the quality of the rice should be settled by the arbitration of two sworn brokers in London; and it was finally stipulated that any dispute arising on the contract should be settled by arbitration in London in the usual manner.

On the 12th October the Southern Rights arrived off the coast, and Gray & Walker advised Hall & Jones of the fact, and received from them the following answer: —

"Liverpool, 12th October, 1864.

"Dear Sirs, — We duly received your telegram respecting the Southern Rights, and we regret to inform you that the buyer is not able to meet his engagement (will declare name if you wish), and therefore you had better act in the matter for the interest of your own friends.

"Yours truly,

"HALL & JONES."

On the 13th of October, Gray & Walker telegraphed to Hall & Jones as follows: "We construe your letter as authority to sell Southern Rights at once, and charge your estate with difference. Can get your deed signed." And by a subsequent telegraph they informed Hall & Jones that they proposed to sell the cargo at 8*s*. 6*d*. per cwt. On the same day they wrote to Hall & Jones the following letter: —

"7 Mincing Lane, London, 13th October, 1864.

"Dear Sirs, — Your favour to hand of the 12th. —
*314 'Southern *Rights.' — We refer to telegrams passed between us. We do not see any advantage in keeping this cargo. Prices are more likely to go under 8*s*. 6*d*. than advance. If we, therefore, can obtain 8*s*. 6*d*. for continent, we think all parties would be benefited. If you dissent, please telegraph in the morning, and state your wishes as to disposal of cargo, the port of destination, &c.

"Yours truly,

"T. GRAY & WALKER."

"If you send up your deed we think we can get the signature of Halliday & Co., and also the creditors for 120*l*. or so, on account of the Denmark."

Messrs. Hall & Jones, however, refused to give any authority to sell the cargo, and on the same day, the 13th October, wrote from Liverpool as follows: —

"Dear Sirs, — Within we copy telegrams passed between us to-day, and in confirmation of ours we write. In our present position we cannot give any authority to sell, so that if a sale be effected it must be entirely at your own responsibility.

"Yours truly,

"HALL & JONES."

On the 14th October, Gray & Walker wrote another letter to Hall & Jones, in which they said: —

"We are instructed to give you notice on behalf of Messrs. Halliday, Fox, & Co. that they will proceed to dispose of the above cargo, or will feel themselves at liberty so to do, unless by to-morrow at one o'clock you give them some definite reply about port of destination, &c., in conformity with contract.

"Yours truly,

"T. GRAY & WALKER."

"P. S. — The ship is now on demurrage. We doubt whether more than 8*s*. 4½*d*. will be offered or is obtainable, *and at Liverpool the market price seems lower than *315 this price."

In reply to this, Hall & Jones reiterated that they were in the hands of the creditors, and were not in a position to give any authority to sell, or any other instructions.

On the 15th October (Saturday), Gray & Walker wrote another letter containing the following passage: —

"Our principals wish to do the best with this cargo, both as respects your estate and all parties concerned, and will wait till Monday before they take final steps. In the mean time the ship remains on demurrage at your charge."

On the following Monday (the 17th October), having received no answer from Hall & Jones, Gray & Walker wrote again as follows: —

"As you have failed to elect a port of destination for the Southern Rights after several days' notice of her arrival, sellers have elected one; viz., the port of London, to which the vessel has been directed to proceed. We believe our market is higher for this description of rice than yours."

On the 17th October, before this letter was received, the deed of arrangement was executed.

The Southern Rights arrived in the port of London on the 22d October.

On the 13th November, Gray & Walker wrote to Hall & Jones as follows:—

* 316 "On the other side please * find out-turn of the cargo of rice per Southern Rights. Will you kindly name an arbitrator to assess the same?

"Yours truly,

"THOS. GRAY & WALKER."

Hall & Jones replied, declining to appoint an arbitrator, on the ground that in their present position they had no authority to move in the matter. The sellers accordingly appointed two arbitrators, and gave them the following instructions:—

"Southern Rights at Rangoon.

"26 November, 1864.

"Referring to our contract for a cargo of rice by the above ship, as per our contract book, herewith we request you to hold an arbitration on the same, to decide whether the rice is fair average quality for the season, and if not, what allowance the buyers are entitled to for inferiority to guarantee; also to determine the prices at which the damages are to be charged. The contract was made, as you see, on the 11th of May last, between Messrs. Halliday & Co. and Messrs. Hall & Jones of Liverpool.

"Yours faithfully,

"THOS. GRAY & WALKER."

On the 16th November, Halliday & Co. deposited the bill of lading with Messrs. Overend, Gurney, & Co., as security for advances made by them, and Gray & Walker gave notice of this to

Hall & Jones. The following reply was returned by the solicitors acting on behalf of the trustees: —

"22d November, 1864.

"In reply to your notice to Messrs. Hall & Jones of the 17th instant on behalf of Messrs. Overend, Gurney, & Co., we are instructed to inform you that the trustees of Hall & Jones regret that they cannot acknowledge * any responsibility on * 317 the contract for the cargo per Southern Rights. We are, gentlemen,

"Yours respectfully,

"JNO. BEWLEY & SON."

The cargo was sold on the 9th December, by auction, for 10,223*l.* 6*s.* 7*d.*, leaving a deficiency of 2472*l.* 1*s.* 5*d.* due to Halliday & Co., which they claimed against the estate of Hall & Jones. Mr. Commissioner PERRY refused to allow the proof, on the ground that there had been no breach of the contract before the execution of the deed of arrangement, and also that the benefit of the contract had been assigned to Messrs. Overend, Gurney, & Co., whereby Halliday & Co. were precluded from sustaining any application under the 153d section of the Act. From this decision Halliday & Co. appealed.

Mr. J. C. Mathew (with whom was *Mr. Bacon*), for the appellants. — First. The contract was broken by the neglect of Hall & Jones to name the port of discharge. The appellants considered the contract at an end, for through their agents they ordered the ship to London, which the sellers had no right to do under the contract.

Secondly. If not broken, the contract was repudiated. Hall & Jones repudiated it by their letter of the 12th October, and by their subsequent conduct. Halliday & Co. assented to such repudiation; and if they did not, we contend that such assent was not neccssary, for as the contract has never been performed, we have a right now to elect to treat the repudiation as a breach of the contract. * *Hockster* v. *De La Tour*, (*a*) *The Danube* * 318 *Railway Company* v. *Lewis*. (*b*)

(*a*) 2 El. & Bl. 678.

(*b*) 31 L. J. (C. B.) 84, 284. See also Cart *v.* The Ambergate Railway

Mr. W. F. Robinson (with whom was *Mr. Cohen*), for the trustees of the deed of arrangement. — The neglect to name a port of delivery was not a breach of the whole contract, but only a ground of claim for demurrage. Until the delivery of the cargo there could be no breach of the contract on the part of the buyers, and at that time it was out of their power, for they had done what was equivalent to an act of bankruptcy. There could be no repudiation without the assent of the other party, and Halliday & Co. had all along treated the contract as subsisting. The appointment of arbitrators was made under the contract. [He was stopped by the Lord Chancellor.]

Mr. Mathew, in reply. — The nomination of arbitrators was, in the ordinary course of trade, as a means of assessing the damages, not under the contract.

The Lord Chancellor. — I am of opinion, that at the time of the execution of the deed of trust the contract was a subsisting contract, neither broken nor renounced. It would have been perfectly competent for the trustees to claim the benefit of it and to accept the cargo at London. The contract was not treated by the parties as at an end; on the contrary, the sellers con-
* 319 stantly sought the directions of the buyers * as to the disposal of the cargo. At the time of the execution of the deed the contract was incomplete, and had not been performed by the vendor, and consequently was not one in respect of which there could be a proof for damages until after the date of the deed.

But as to the particular point of demurrage, I agree that the claim for demurrage was complete at the time of the execution of the deed and could be proved for under the deed. I am bound, therefore, to confirm the order of the commissioner.

Company, 17 Q. B. 127; Avery *v.* Bowden, 5 El. & Bl. 714; Reid *v.* Hoskins, 4 El. & Bl. 979.

STEWART *v.* THE GREAT WESTERN RAILWAY COMPANY and SAUNDERS.

1865. July 1. Before the Lord Chancellor Lord WESTBURY.

A bill to restrain a defendant from setting up a certain plea in an action at law, on equitable grounds which the plaintiff might equally have availed himself of at law, is not demurrable merely because it does not go on to pray compensation or any other consequential relief in equity.[1]

A plaintiff who seeks the interference of a Court of Equity is not bound, as the price of such interference, to bring the whole matter into equity.

THE bill in this cause was filed by James Stewart and Isabel his wife, and stated that on the 23d of August, 1864, the plaintiffs were travelling by the defendants' railway, when a collision took place between the train in which they were travelling and a coal train, and the plaintiffs were both seriously injured, the female plaintiff's leg being broken, and the plaintiff James Stewart receiving injuries on his head, chest, and back. The defendant Saunders was the secretary of the company, and was made a party for the sake of discovery. The plaintiffs were attended by Mr. William Woodward, a surgeon residing at Worcester, who was employed by the railway company to attend the sufferers by the collision, * and were also occasionally visited by Dr. Cooper, the prin- * 320 cipal medical officer of the company, and Mr. Hill, their local medical officer at Worcester.

The bill then stated that these gentlemen were employed by the company as their agents to settle with the plaintiffs for the compensation due to them for their injuries on the best possible terms, and that they had, with that object, made false representations to the plaintiffs that those injuries were much more slight than was really the case, and in particular that Mr. Woodward had assured them that Dr. Cooper did not think the plaintiff Isabel Stewart's leg was really broken.

The bill stated that, deceived by these representations and being much pressed by these gentlemen, and particularly by Mr. Wood-

[1] See 2 Joyce Inj. 908–910, 1056; Lee *v.* Lancashire and Yorkshire Railway Co., L. R. 6 Ch. Ap. 527; 19 W. R. 729; Kerr Inj. 25, 26; 1 Dan. Ch. Pr. (4th Am. ed.) 552 and note (7); 2 ib. 1625 and note (4).

ward, the plaintiffs had consented to accept 15*l.* as compensation for their injuries, and had signed a receipt in full discharge of all claims, which Mr. Woodward had prepared, and which he tendered to them without reading it to them or giving them an opportunity of reading it for themselves.

The plaintiff James Stewart, afterwards finding that their injuries were really serious, brought an action on the 24th February, 1865, in the Court of Queen's Bench against the company, claiming 200*l.* damages for injuries received by himself and 1500*l.* for injuries received by his wife.

To this action the defendants pleaded not guilty, and also that the plaintiff had accepted 15*l.* in full satisfaction and discharge of all the causes of action.

The plaintiffs then filed the present bill, praying that it
* 321 might be declared that the receipt might stand as a * receipt only for the sum of 15*l.*, and that the defendants, the company, might be restrained from relying on their second plea, and from in any manner setting up the payment of the 15*l.*, or the receipt given by the plaintiff James Stewart, as a satisfaction and discharge of the damages claimed by him.

To this bill the defendants demurred for want of equity. Vice-Chancellor KINDERSLEY overruled the demurrer, and the defendants appealed from this decision.

Mr. Glasse, *Mr. G. L. Russell*, and *Mr. Henry James* (of the common-law bar), for the defendants. — The plaintiffs pray for no compensation, nor any other consequential relief in equity; they merely ask for relief which they might have obtained equally well at law, by filing a replication of fraud to the defendants' second plea. If the statements in the bill are true, the company have taken the benefit of the fraudulent act of their agent, and would be liable for it in their corporate capacity at law as well as in equity. *Collins* v. *Blantern*, (*a*) *Eastern Counties Railway Company* v. *Broom*. (*b*)

Mr. Baily, *Mr. Wickens*, and *Mr. Garth*, for the plaintiffs, were not called on.

(*a*) 2 Wils. 341. (*b*) 6 Exch. 314.

THE LORD CHANCELLOR. — I should have had very little difficulty in coming to the conclusion that the company, by taking the benefit of the contract and adopting the act of their agent, must be held to have done so subject to the consequences of any fraudulent conduct on his part. But I have here a * bill asking relief * 322 on an old and well-ascertained ground of equitable jurisdiction, and I am asked to refrain from exercising that jurisdiction, because the plaintiffs' prayer is limited to asking that the defendants may be restrained from setting up a document, which the plaintiffs assert to be fraudulent. It is said that the prayer would have been right if it had gone on to pray for compensation, but I think there is no reason for the plaintiffs extending their claim to this. On the contrary, I think such a course would have been an inconvenient course. The Court would probably have sent the question of compensation to be tried by a jury at law. The prayer was, therefore, properly confined to such relief as the Court could not refuse without repudiating its own jurisdiction, and the bill would have been wrong if it had extended to ask relief which probably this Court would have refused to grant.

Nor can I refuse to assist the plaintiffs because they decline to transfer to this Court the whole of the matter, which may be more conveniently entertained at common law. An instrument has been improperly obtained; the plaintiffs are entitled to have the power to use it taken out of the defendants' hands, and they are not to be called on to submit the whole case to this Court as the price of its interference. This Court has the jurisdiction, and I hold that it is bound to use it. On these grounds, without giving any opinion on the merits of the plaintiffs' case, I shall overrule the demurrer and dismiss the appeal with costs.

* JOPP *v.* WOOD.

SMITH *v.* JOPP.

1865. July 11, 13. Before the Lord Chancellor Lord CRANWORTH.

By a marriage settlement a fund was limited in trust after the death of the parents to transfer, &c., to all the children equally; the shares of minors to be paid, transferred, &c. at their age of twenty-one years, with maintenance in the mean time: and there was a gift over if there should be no child, or "if they should all happen to die before they became entitled to their respective shares:" *Held*, that the shares of the children vested at their birth, and that the shares of two of them, who died in their infancy in the lifetime of their parents, passed to their personal representatives.[1]

A petition of appeal by some of several co-plaintiffs against the others of them was allowed.

BY a bond dated the 19th January, 1816, made on the marriage of John Smith and Eleanor Gale, a sum of 10,000*l.* was secured to trustees upon trust to pay the income to John Smith for his life, and after his death to Eleanor Gale, and the bond proceeded as follows: —

"And from and immediately after the decease of John Smith and Eleanor Gale upon trust that the said trustees, &c., do and shall transfer, assign, and make over the said sum of 10,000*l.* sterling to and between or among all and every the child and children of the body of John Smith on the body of Eleanor Gale begotten, his, her, or their respective executors, administrators, or assigns, equally to be divided between them the said children, if more than one, share and share alike, and if but one, then to such only child, the share or shares of such of the said children as shall be a son or sons, if minors or infants under the age of twenty-one years at the decease of the survivor of them John Smith and Eleanor Gale, to be paid, transferred, assigned, and made over to him or them respectively at his or their age or respective ages of twenty-one years, and the share or shares of

[1] See Neathway *v.* Reed, 3 De G., M. & G. 23, note (1), and cases cited; Winslow *v.* Goodwin, 7 Met. 363; Gardner *v.* Hooper, 3 Gray, 398; Nash *v.* Nash, 12 Allen, 345; Dunn *v.* Sargent, 101 Mass. 336.

the said children as shall be a daughter or daughters, if minors or infants under the age of twenty-one years at the decease of the survivor of them John Smith and Eleanor Gale, to be paid, transferred, assigned, * and made over to her or them * 324 respectively at her or their age or respective ages of twenty-one years, or on the day or days of her or their marriage or respective marriages, which shall first happen after the decease of the survivor of them John Smith and Eleanor Gale.

"And upon further trust to pay and apply from and after the decease of the survivors of them John Smith and Eleanor Gale, the interest and produce of the several and respective shares of the said several and respective sons and daughters which shall happen to be minors or infants under twenty-one years of age, or unmarried as aforesaid, at such the decease of the survivor of them John Smith and Eleanor Gale to and for the respective maintenance and education and support of the said several and respective sons and daughters until they shall severally and respectively attain their said several and respective ages of twenty-one years or be married.

"And in case John Smith shall have no child or children on the body of Eleanor Gale by him begotten, or having any such child or children and all of them shall happen to die before they become entitled to their respective shares or portions of and in the trust moneys and premises, upon trust that the trustees do and shall from and immediately after the decease of Eleanor Gale pay and dispose of the 10,000*l.* unto such person as John Smith by any deed or by his last will shall direct or appoint, and in default of such direction or appointment, for the executors or administrators of John Smith."

Eleanor Smith died in 1825, and John Smith in 1830.

There were six children of the marriage; four survived their parents and attained twenty-one, and two, Eleanor * and Mungo, died in early infancy in the lifetime of their * 325 parents.

The original bill was filed in 1860 by the four surviving children and those claiming under them against the sole surviving trustee of the fund for a declaration of the rights of the parties.

The cause was heard before the Master of the Rolls on the 24th March, 1860, when his Honor decided that the interests of all the

children vested at their birth, and that the shares of the two deceased children, Eleanor and Mungo, should be paid to their personal representatives. (*a*)

It was at that time considered that the domicile of John Smith the father, and consequently of his two infant children, was Anglo-Indian, and accordingly their shares were transferred to Elizabeth Smith, the personal representative of their father, who had obtained letters of administration to their estates.

Subsequently, however, by an order of the Master of the Rolls, dated the 5th May, 1863, (*b*) it was declared that at the dates of their respective deaths, the domicile of Eleanor and Mungo Smith was Scotch, under the law of which country their collateral relations, and not their father, were their next of kin. Consequently the letters of administration to Elizabeth Smith were revoked, and fresh letters were granted to Margaret Jopp, as the sister of the deceased children; and their shares were accordingly transferred to her.

In consequence of this change in the relation of the
* 326 * parties to each other, it became the interest of some of the plaintiffs to dispute the decision of the Master of the Rolls as to the construction of the bond which had been previously acquiesced in; and a supplemental bill was accordingly filed by such of the plaintiffs in the original bill as were interested in advocating the claims of the four children who attained twenty-one against their co-plaintiffs, praying that a fresh distribution might be made of the funds paid to Margaret Jopp, and that the rights of all parties might be declared; and at the same time they presented a petition of rehearing of the decree in the original bill. The supplemental bill and the petition of rehearing came on together before the Lord Chancellor.

Mr. Giffard and *Mr. A. Hanson*, for the plaintiffs.—This being a settlement, many of the authorities which relate to wills are inapplicable. The question turns upon the meaning of the word "entitled," which is equivalent to attaining a vested interest. There are three periods to which, grammatically, it may apply. First, to the births of the children; secondly, to their attaining twenty-one; thirdly, to their surviving their parents. It cannot

(*a*) 28 Beav. 52.
(*b*) Reheard, December 2, 1864; 13 W. R. 222.

be the first period, because it would be inconsistent with the gift over in case they should "happen to die" before they become entitled. The only reasonable construction is, that the period of vesting was their attaining twenty-one.

Any other construction leads to the hardship, that if all the children died in the lifetime of their parents they would be disinherited although they might have left issue.

They cited *Teynham* v. *Webb*, (*a*) *Hubert* v. *Parsons*, (*b*) *Mostyn* v. *Mostyn*, (*c*) *Chevaux* v. *Aislabie*, (*d*) *Mair* v. *Quilter*, (*e*) *Daniel* v. *Gosset*, (*g*) *Schenck* v. *Legh*. (*h*) * 327

Mr. E. Cutler (with whom was *Mr. Selwyn*), for the defendants. — If the shares were not vested at the birth of the children, the clause postponing payment till the age of twenty-one would have been differently expressed. The interests of the children are called "shares," not "presumptive shares." The word "entitled" means here "entitled to possession or payment." The word "vested" has been sometimes held to refer to the actual payment, and "entitled" is not so strong a word. *Re Baxter's Trusts*. (*i*) He also cited *Blythe* v. *Granville*, (*k*) *Whatford* v. *Moore*, (*l*) *Farrer* v. *Barker*, (*m*) *Skey* v. *Barnes*, (*n*) *Woodcock* v. *Duke of Dorset*, (*o*) Jarman on Wills. (*p*)

He also objected to the appeal as being irregular, on the ground that one plaintiff could not appeal from a decree against his co-plaintiff. (*q*)

Mr. Hanson, in reply. — With respect to the objection to the form of the appeal, such an appeal was allowed in *Colvin* v. *Hartwell*. (*r*) If there is any irregularity, it is set right by the supplemental bill.

(*a*) 2 Ves. 198.
(*b*) 2 Ves. 261.
(*c*) 1 Coll. 161.
(*d*) 13 Sim. 71.
(*e*) 2 Y. & C. C. C. 465.
(*g*) 19 Beav. 478.
(*h*) 9 Ves. 299.
(*i*) 10 Jur. (N. S.) 487.
(*k*) 13 Sim. 190.
(*l*) 3 My. & Cr. 270.
(*m*) 9 Hare, 737.
(*n*) 3 Mer. 335.
(*o*) 3 B. & C. 569.
(*p*) Vol. 2, p. 662 (2d ed.).
(*q*) See Cholmondeley *v.* Clinton, Turn. & Russ. 107, 115.
(*r*) 5 Cl. & Fin. 484.

* 328 * [The Lord Chancellor, at the conclusion of the argument, said that he was of opinion that the appeal was correct in point of form.]

July 13.

THE LORD CHANCELLOR. — The short question in this case arises on the construction of a clause in a settlement made on the marriage of John Smith and Eleanor Gale, dated the 19th of January, 1816. After giving life-interests to the parents, the settlement proceeds as follows: [His Lordship read the clause as given above.]

What happened was this: there were six children; two died in early infancy, and the other four all attained the age of twenty-one years, and survived their parents. The present question arises in the distribution of the trust-fund, what is to be done with the shares of the two children who died under twenty-one?

If the sentence had ended with its first member, there could be no doubt that every child at its birth obtained a vested interest, liable to be divested *pro tanto* on the birth of other children; but the argument is, that this obvious construction is modified by the gift over.

According to the original clause, every child at its birth became entitled to what should eventually be its proportionate share. But there is a gift over in case of the death of all the children before they should become entitled to their respective shares. This, it was argued, shows that it could not have been intended to confer any indefeasible interest on a child at its birth, — for how
* 329 could a child die before it should become entitled, if it * became absolutely entitled at the moment of its birth? The whole case depends on our putting a proper interpretation on the word "entitled." That word may, without any violence to language, mean entitled in interest, or entitled in possession; that is, entitled to payment. The Master of the Rolls considered the latter to be, in this case, the proper construction, and I concur with him in the view he has taken.

The appellants argued that this construction might lead to great hardship. All the children might live, marry, and have families, and then, if they should all die in the lifetime of their father, the fund would be at his disposal, and might go over to strangers. That certainly is so. But the argument proves no more than that the settlement was inartificially framed. Perhaps it was thought

that the difficulty was sufficiently met by giving the father, in the case contemplated, a disposing power which would enable him to correct the defect in the settlement. But, be that as it may, I cannot adopt the reasoning of the appellants, by which they would fix arbitrarily on the majority of every child as the time at which its share was to vest. There is nothing on the face of the deed pointing to such a construction, and even supposing that we should thereby be able to solve all difficulties, we should be doing so by making a new, and not by construing the existing, settlement. On these short grounds, I concur with the Master of the Rolls.

The appeal must be dismissed with costs.

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* LEIGH *v.* LLOYD. * 330

1865. July 20, 21, 25. Before the Lord Chancellor Lord CRANWORTH.

A member of a building society received an advance from the funds of the society and deposited the lease of his land with the trustees as security for repayment, at the same time signing an agreement to execute a mortgage. He afterwards executed a mortgage to the trustees containing a power of sale, under which the trustees sold the property for the remainder of the term to the defendants. Previously, however, to the execution of the mortgage the mortgagor assigned the premises, "subject to the mortgage to the building society," to the defendants for valuable consideration, who thereby became possessed of the legal estate.

Held, that the defendants must be taken to have had notice that the mortgage would contain a power of sale, and they were declared to be trustees of the property for the plaintiff.[1]

BY an indenture dated the 18th October, 1847, the Earl of Mornington demised to John Wood nine cottages at Woodford, in Essex, for a term of ninety-nine years from the 29th September, 1847, at a yearly rent of 23*l*.

At that time John Wood was a member of the Second Walthamstow Building Society and the owner of a share therein, No. 58. Under the rules of the society, he was entitled to an advance of

[1] See Heyer *v.* Pruyn, 7 Paige, 465; Hughes *v.* Edwards, 9 Wheat. 489; Wright *v.* Eaves, 10 Rich. Eq. (S. Car.) 582; 2 Sugden V. & P. (8th Am. ed.) 749, and note (*a*), and cases cited.

200*l*., and he accordingly applied for the advance of that sum on the security of his lease.

On the 1st May, 1849, Wood deposited the lease with the trustees of the society, and at the same time signed the following memorandum: —

"I, John Wood, of, &c., one of the members of the Second Walthamstow Building Society, in consideration of 200*l*. advanced to me out of the funds of the above society on an appropriation made on the share No. 58, do hereby deposit with the trustees of the said society the deeds of the lease of certain property belonging to the Earl of Mornington, and situate at the back of the Castle Inn, in the parish of Woodford, as a collateral security, and
* 331 I do hereby engage to execute a mortgage-deed * to the said society for the above amount when called upon by the committee and trustees so to do.

"Signed this 1st day of May, 1849.

"JOHN WOOD."

The sum of 200*l*. was advanced to Wood by instalments, 50*l*. being paid on the 2d June, 1849, and the rest by three instalments of 50*l*. each on the 12th June, the 20th July, and the 26th September, 1849.

By an indenture dated the 2d June, 1849, made between John Wood of the first part, Richard Batley the elder of the second part, and the defendants Henry Thomas Lloyd and Richard Batley the younger of the third part, in consideration of the sum of 50*l*. previously lent by R. Batley the elder to Wood, and of the further sum of 100*l*. paid to Wood on the execution of the deed, Wood assigned all the premises comprised in the indenture of lease to the defendants for the residue of the term, upon trust for Wood during his life, and after his death for Hannah the wife of R. Batley the elder, and after the death of the survivor upon certain trusts for the benefit of the children of R. Batley the elder and his wife.

The assignment was made expressly "subject to a certain mortgage of the said leasehold premises by the said J. Wood to the Walthamstow Building Society, for securing the sum of 200*l*. and interest, but with all benefit of the proviso for redemption contained in the mortgage-deed thereof."

On the 20th July, 1849, Wood demised the nine cottages to the trustees of the society for a term of ninety-seven years from the 24th June, 1847, subject to a proviso for redemption on payment by Wood to the * society of the 200*l.* advanced to * 332 him, by quarterly instalments, and on his otherwise complying with the rules of the society. The deed contained a proviso that if the mortgagor should make default in any of these payments, or should not otherwise fulfil his obligations to the society, the trustees might, without his further consent, sell the mortgaged premises, with all usual powers.

The deed was in the form usually adopted by the building society; but there was nothing in the rules of the society requiring the mortgage-deeds on which their funds were advanced to contain a power of sale.

It did not appear that at the time of the execution of the mortgage the trustees of the society had any notice of the assignment of the 2d June, 1849.

On the 25th March, 1856, Wood having made default in payment of his instalments, the trustees, in exercise of their power of sale, sold the premises to the plaintiff Nathaniel William Leigh for 240*l.*, and conveyed the same to him by an indenture dated the 18th May, 1856, for all the residue of the term of ninety-seven years created by the mortgage-deed.

In December, 1863, the defendants, having the legal title under the assignment of the 2d June, 1849, brought an action of ejectment against the plaintiff; and the present bill was filed praying that the action might be restrained, and that the defendants might be declared trustees of the term for the plaintiff, and might be decreed to convey the same to him.

On the 20th April, 1865, the Master of the Rolls, before whom the cause was heard, granted the relief * prayed by * 333 the bill, and from this decree the defendants appealed.

The plaintiff disputed the payment of the consideration for the deed of the 2d June, 1849, under which the defendants claimed, contending that it was a voluntary settlement, but the decision of the case did not turn upon that point.

Mr. Southgate and *Mr. Marten*, for the plaintiff. — The defendants took expressly subject to the mortgage to the building society. They had notice of the deposit, and consequently of the memoran-

dum which accompanied it. A mortgage necessarily implies a power of sale. *Russell* v. *Plaice*, (*a*) *Bridges* v. *Longman*, (*b*) *Matthews* v. *Goodday*. (*c*)

Mr. Selwyn and *Mr. G. L. Russell*, for the defendants. — We admit that the defendants took subject to a charge for 200*l*., but not to a mortgage with a power of sale. The charge is called a mortgage in the deed of assignment, but it was merely a memorandum of deposit, and there was nothing in the rules of the building society to give them notice that a mortgage with a power of sale would be executed.

A mortgage does not in itself imply a power of sale. If it did, the 48th section of the 15 & 16 Vict. c. 86, giving power to the Court to sell mortgaged property, would have been unnecessary. *Samble* v. *Wilson*, (*d*) *Moore* v. *Perry*, (*e*) *Underwood* v. * 334 *Joyce*, (*g*) *Clarke* v. * *Royal Panopticon*, (*h*) *London Monetary Advance Company* v. *Brown*, (*i*) Seton on Decrees. (*k*)

Mr. Marten, in reply, referred to *Newman* v. *Selfe*, (*l*) *Foster* v. *Harvey*. (*m*)

The Lord Chancellor reserved judgment.

July 25.

The Lord Chancellor, after stating the facts of the case as mentioned above, proceeded as follows : —

It is not alleged by the defendants that Wood concealed from them or from Batley the existence of a mortgage to the building society for 200*l*., but they say that there was nothing to point out to them that there was any power of sale in the mortgage ; so that they had no notice of what is, in fact, the foundation of the plaintiff's title. They, therefore, insist on their legal right under an assignment prior to the deed of the 20th July, 1849, which

(*a*) 18 Beav. 21.
(*b*) 24 Beav. 27.
(*c*) 10 W. R. 148.
(*d*) 5 N. R. 395.
(*e*) 1 Jur. (N. S.) 126.
(*g*) 7 Jur. (N. S.) 566.
(*h*) 4 Drew. 26.
(*i*) 13 W. R. 490.
(*k*) Page 449 (3d ed.).
(*l*) 33 Beav. 522.
(*m*) 12 W. R. 92.

created the power of sale. I cannot, however, think that this is a claim to which the Court can listen. They had distinct notice of a mortgage to the building society, and that must be taken to mean notice of the very agreement which was signed by Wood when he deposited the deeds on the 1st May, 1849. This, indeed, was not disputed, but the contention at the bar was, that though by that agreement Wood engaged to execute a mortgage when called on to do so, such an agreement did not necessarily imply an agreement to execute a mortgage with a power of sale. Be it so. But it certainly did not import that he would not give a * power of sale. It left the terms of the mortgage to be * 335 settled between the parties as they might deem right. If the defendants chose to proceed with their purchase without first ascertaining what were the terms of the mortgage contemplated by the plaintiff, they must be bound by those terms when arranged.

The defendants have no one to blame in this affair but themselves. It appears by Wood's receipts that the 200*l.* was advanced to him by four instalments of 50*l.* each; the first not having been made till the 2d June, 1849, the very day on which the assignment was made to the defendants. If, therefore, they had taken the ordinary precaution of communicating with the society before the purchase was completed they would have learned the exact truth. The society would have been able to state to them the exact nature of the mortgage they were about to require, and might have refused to make any advances unless on a mortgage with a power of sale prior to any assignment to the defendants. Instead of this, with full knowledge that there was a mortgage subsisting against them, they chose to take an assignment without ascertaining the particulars of it, and by the terms and consequences of that mortgage they must be bound.

I think the decree of the Master of the Rolls was perfectly right, and that this appeal must be dismissed with costs.

* 336 COVENTRY *v.* CHICHESTER.[1]

1864. June 23, 24. August 3. Before the LORDS JUSTICES.

A father, on the marriage of his daughter C. C., covenanted to pay 10,000*l.* three months after demand to trustees, to be held upon trust during the joint lives of the husband and wife to pay 200*l.* a year to the wife as pin-money and the residue of the income to the husband, and after the death of either the whole income to the survivor for life, and after the death of the survivor upon the usual trusts of a marriage settlement for children and issue. The father also covenanted to pay interest till the principal was paid. By his will he gave his residuary estate to trustees in trust to convert it into money, pay thereout his debts and legacies, and stand possessed of the residue as to one moiety upon trust to pay the income to his daughter C. C. for life for her separate use, and after her death, then, if she died in her husband's lifetime, upon trust for such persons other than her husband as she should by will appoint, but if she survived him, for such persons as she should by deed or will appoint, and in default of appointment upon precisely similar trusts for his daughter L. P., with an ultimate limitation, in default of appointment, to his nephew C. B.; and as to the other moiety upon precisely similar trusts, except that the dispositions in favour of L. P. preceded those in favour of C. C. The 10,000*l.* was not paid by the testator in his lifetime: *Held*, by the Lord Justice KNIGHT BRUCE, affirming the decision of Vice-Chancellor WOOD, *dissentiente* the Lord Justice TURNER, that the 10,000*l.* payable under the settlement must be deducted from C. C.'s moiety of the residue.

Held, by the Lord Justice TURNER, that the entire dissimilarity of the trusts of the settlement and will, and the directions in the will for payment of debts before the division of the residue into moieties, were sufficient to outweigh the leaning of the Court against double portions,[2] and that the 10,000*l.* ought to be paid out of the whole residue, and not out of C. C.'s moiety: and query, whether the first ground alone would not be sufficient.

THIS was an appeal by the defendant, Lady Caroline Mary Chichester, from part of an order of Vice-Chancellor WOOD, who had held that she could not take a moiety bequeathed to her by her father's will in his residuary estate without deducting therefrom 10,000*l.*, which he had secured by a covenant contained in her marriage settlement. (*a*)

Henry Bevan, the father of the appellant, had two daughters only, the appellant and Louisa Harriet. Louisa in the year 1828

(*a*) 2 Hem. & M. 149.

[1] Reversed in House of Lords, L. R. 2 H. L. 71.

[2] This opinion of TURNER L. J. was affirmed in House of Lords, L. R. 2 H. L. 71; Paget *v.* Grenfell, L. R. 6 Eq. 11.

married Mr. Paul, and no settlement was ever made upon her by her father.

In 1844 the appellant was married to Lord John * Chich- * 337 ester, and an antenuptial settlement was executed, which was made between Lord John Chichester of the first part, the appellant of the second part, the testator Mr. Bevan of the third part, and trustees of the fourth part, by which the testator covenanted with the trustees, that if the marriage should be solemnized, the testator, his heirs, executors, or administrators, would pay to the trustees the sum of 10,000*l.* within three calendar months next after demand of payment should be made by notice in writing to be given by them to the testator, his executors or administrators, and would in the mean time, until payment of the principal sum, pay to the trustees interest for the same at the rate of 3*l.* per cent per annum, computed from the day of the date of the settlement, by half-yearly payments. Trusts were declared of the 10,000*l.* to the following effect: that the trustees should, during the joint lives of the husband and wife, pay 200*l.*, part of the income, to the wife as pin-money, and the residue to the husband, and after the decease of either, pay the whole income to the survivor for life, and after the decease of the survivor, should hold the fund in trust for the issue of the marriage as the husband and wife or the survivor should appoint, and in default of appointment, for such children as should attain twenty-one or marry, and in default of children attaining a vested interest, for the wife if she survived, but if she died in her husband's lifetime, then as she should appoint by will, and in default of appointment, in trust for the persons who would have been entitled as her next of kin if she had died possessed thereof intestate and without having been married.

The testator, by his will dated the 3d of December, 1859, after making various specific and pecuniary devises and bequests, gave and devised his residuary real and * personal estate to * 338 the plaintiffs, upon trusts for conversion, and declared that his trustees should, out of the proceeds, pay his debts and legacies, and invest the residue, and hold the same upon trust to pay one moiety of the income of the trust fund to the appellant for her sole and separate and inalienable use and benefit, exclusively of her then present or any future husband, and so as that the same should not be in any way subject to his or their control, debts, interference, or engagements, and with a restraint upon antici-

pation, and after her decease, upon trust that the trustees should stand possessed of one moiety of the principal of his said residuary trust fund and the interest thereof upon the following trusts, namely, in case Lord John Chichester should be living at the time of the appellant's decease, upon trust for such person or persons (other than and except her husband the said Lord John Chichester, and so that he should take neither directly or indirectly any estate or interest therein under any appointment made under this power), and for such estates as the appellant should by will appoint; but in case Lord John Chichester should die in the lifetime of the appellant, then for such person or persons generally as the appellant should by deed while a widow or by will appoint, and in default of appointment, for the separate use of Mrs. Paul for life, with a restraint on anticipation; and after the death of the survivor of the appellant and Mrs. Paul, then if Mr. Paul survived Mrs. Paul, upon trust for such persons (other than Mr. Paul) as Mrs. Paul should appoint by will, but if Mr. Paul should die in Mrs. Paul's lifetime, then as Mrs. Paul should by deed while a widow or by will appoint, and in default of appointment, upon trust for the testator's nephew, C. J. Bevan. The testator then declared trusts of the other moiety of the fund precisely similar to those of the first moiety, except that
* 339 the * limitations in favour of Mrs. Paul preceded those in favour of the appellant; and the testator declared his express intention to be, that no part of his will should be construed to give any right or interest of or in his estate and effects, or of or in any part thereof, or of or in the annual proceeds thereof, to Lord John Chichester or Mr. Paul, either in their own rights or in right of his daughters respectively or otherwise; and he declared that, in case any part or share of his estate and effects or any interest, either present or contingent, therein should be adjudged by any court of law or equity to be or to be liable to become vested in or held in trust for Lord John Chichester or Mr. Paul, then he gave and bequeathed such last-mentioned part, share and interest, to his said trustees upon trust for his said nephew Charles James Bevan, his executors, administrators, and assigns; and the testator appointed the plaintiffs executors of his will.

The testator died in 1860, and at his death the 10,000*l.* remained due from his estate. Mrs. Paul had children, who were of age at the date of the will; the appellant had no child. The

question now was whether the 10,000*l.* was, as between the sisters, to be paid out of the whole residue before dividing it into moieties, or to be paid out of the appellant's moiety.

The suit was instituted by the trustees and executors of the will for the administration of the testator's estate, and, on further consideration, Vice-Chancellor WOOD made a declaration that the appellant was not entitled to the benefits given to her by the will in one moiety of the testator's residuary estate without first deducting therefrom the 10,000*l.* secured by the settlement.

* *Mr. Rolt* and *Mr. Bristowe*, for the appellant. — The * 340 10,000*l.* was a debt due from the testator, and the direction in his will to pay his debts before dividing the residue is by itself enough to dispose of the case. The Vice-Chancellor decided the case solely on the ground of the presumption against double portions, but this presumption does not prevail against indications of intention. *Hopwood* v. *Hopwood*, (*a*) *Weall* v. *Rice*. (*b*) Suppose the money had been paid by the testator to the trustees, and he had then made a will giving a legacy to the daughter, surely it could not have been contended that the 10,000*l.* would then have been deducted from the legacy, and it cannot make any difference that payment was not enforced during the testator's life. *Wharton* v. *Earl of Durham*, (*c*) *Lady E. Thynne* v. *Earl of Glengall*, (*d*) *Hall* v. *Hill*, (*e*) Lord ST. LEONARD'S Law of Real Property. (*g*) If a bond had been given to the daughter, not on her marriage, the legacy would not have satisfied it. *Tolson* v. *Collins*, (*h*) *Stockers* v. *Stockers*. (*i*) The marriage cannot make any difference, and the covenant is not with the daughter, but with trustees who hold on trust for other persons beside the daughter, which is in our favour. *Kirk* v. *Eddowes*. (*k*) There was here an intention to create equality as to the testamentary provisions, but not further. The trusts of the two instruments are entirely different. The settlement gives interests to the husband and children; the will excludes the husband and gives nothing to the children, and limits the property over ultimately to a stran-

(*a*) 7 H. L. Cas. 728, 737.
(*b*) 2 R. & M. 251, 267.
(*c*) 3 M. & K. 472; 3 Cl. & Fin. 146.
(*d*) 2 H. L. Cas. 131.
(*e*) 1 Dru. & War. 94.
(*g*) Pages 126–128.
(*h*) 4 Ves. 483.
(*i*) 4 Sim. 152.
(*k*) 3 Hare, 509, 521.

* 341 ger. It has been held that slight differences are of * no consequence; but it has never been held that one of two provisions of so utterly different characters can be taken to be in satisfaction of the other. *Bellasis* v. *Uthwatt*, (*a*) *Charlton* v. *West*. (*b*) In *Lady Thynne* v. *Lord Glengall* the trusts only differed slightly in the two instruments. Bevan takes an interest under the will: on what principle is that interest to be lessened? The circumstances show an intention to favour Lady John Chichester more than Mrs. Paul, no settlement having been made on the marriage of the latter. In these circumstances, why is not the direction to pay debts to have its full force?

Sir H. M. Cairns, *Mr. Giffard*, and *Mr. Speed*, for Mr. and Mrs. Paul. — Both provisions for the appellant are portions; the first being an advancement on marriage is clearly so; the second also is a portion. *Lady E. Thynne* v. *Earl of Glengall*. (*c*) This, therefore, is a case of two portions. The rule of law is, that in the absence of an indication of intention to give a double portion a child is not to have both provisions. Satisfaction, ademption, and election are only modes of working out this rule. The presumption here is fortified by the scope of the will; it evidently contemplates an equality, which would be wholly destroyed if effect were given to the appellant's contention. It is unnatural to suppose that the testator intended to make a larger provision for the appellant, who, when he made his will, was childless after having been married fifteen years, than for Mrs. Paul, who had grown-up children for whom the testator makes no direct

* 342 provision. The appellant says, first, that * there is in the will a direction to pay debts, and that this is a debt. In a sense no doubt it is, but such a demand is not what a testator is thinking of when he speaks of debts; he looks upon it as a portion. Suppose a testator to covenant in his daughter's marriage settlement to pay 10,000*l*., and afterwards to leave her 10,000*l*. by will, would the fact of the will containing a charge of debts entitle her to the benefit of both provisions? Then the appellant relies on the difference in the limitations; but in each case to make a provision for the daughter is what is contemplated; the limitations to children are only a modification of her mode of

(*a*) 1 Atk. 426.
(*b*) 30 Beav. 124.
(*c*) 2 H. L. Cas. 131.

enjoying it, and the ultimate gift to Bevan in default of appointment does not alter the character of the provision. The difference of the limitations does not decide the case. *Lord Durham* v. *Wharton*, (*a*) *Sheffield* v. *Earl of Coventry*, (*b*) *Lord Powys* v. *Mansfield*. (*c*) If the money had been paid by the testator, no doubt the residue must have been divided equally, without making any allowance for the 10,000*l*.; but it does not follow from this that the case is the same when it has not been paid. If the trustees had enforced payment in the testator's lifetime, he doubtless would have altered his will. *Twining* v. *Powell* (*d*) is in our favour as to the immateriality of the limitation over to Bevan. *Hall* v. *Hill* does not apply in this case, for it was not a case of two portions, but of a debt and a portion.

Mr. Bristowe, in reply.

Judgment reserved.

August 3.

* THE LORD JUSTICE KNIGHT BRUCE.—The authoritative *343 decisions in the House of Lords and elsewhere on the kind of question brought before Sir WILLIAM WOOD and ourselves by this case are such that the Vice-Chancellor seems to me to have had no option as to the conclusion to which he should come, nor, I think, have we any option. For, as I conceive, the 10,000*l*. must be considered as a portion, and the differences in the trusts applicable to the 10,000*l*. and those applicable to the Chichester moiety of the testator's residuary estate under his will appear to me, on the authorities, to be immaterial. I abide by the Vice-Chancellor's conclusion, but altogether under the stress of a series of decided cases, from which I hold that we should not be warranted in departing, and that it would be a departure to overrule what he has here adjudged. Possibly they are not, possibly they are, well founded in principle,—as to that I do not mean to intimate any opinion. I may add, that I have read more than one report of the argument before his Honor, and of his judgment in the present cause, from which it appears, that all the important, or the most important, decisions in point were brought under his attention, and

(*a*) 3 Cl. & Fin. 146.
(*b*) 2 R. & M. 317.
(*c*) 3 My. & Cr. 357, 374.
(*d*) 2 Coll. 262.

considered by him with his usual care and ability. We were also well assisted by the counsel who argued the appeal before us.

THE LORD JUSTICE TURNER. — The concurrent opinion of my learned brother and the Vice-Chancellor Sir WM. PAGE WOOD in this case is, I need hardly say, much more likely to be correct than any opinion of mine, but I am sorry to say I find myself
* 344 unable to agree in their conclusion, and am of * opinion, that Lady John Chichester is entitled to the benefits given to her by the will of the testator in a moiety of his residuary estate, without first deducting therefrom the 10,000*l.* secured by the testator's covenant contained in her marriage settlement.

I agree in opinion with my learned brother and the Vice-Chancellor, that the benefit given by the will to Lady John Chichester in the moiety of the testator's residuary estate ought to be considered as a portion, for she takes, by means of the powers of appointment vested in her, the whole dominion over that moiety, and I do not think that the introduction into the will of the ultimate limitation in favour of Mr. Bevan, dependent as it is upon the non-exercise not only of the powers given to Lady John Chichester, but also of the powers given to Mrs. Paul, can be taken to alter the character of the benefit given to Lady John Chichester; but, speaking with all deference to the opinion of the Vice-Chancellor, whose judgment is in every case entitled to very great weight, I do not agree with him in the opinion, which he appears to have expressed, that, in cases of provisions made for children by different instruments, the fact that the provision made by each of the instruments is in the nature of a portion is of itself sufficient to disentitle the children to the benefit of both the provisions; I do not so understand the law of this Court, and the authorities do not, I think, warrant this position. The Court, no doubt, leans against double portions, and slight differences in the mode in which the different provisions are made are not sufficient to overcome that leaning; but if the instruments show, or it can otherwise by admissible evidence be shown, that both the provisions were intended to take effect, I know no rule of this Court to prevent them from doing so.

* 345 * Cases of this nature resolve themselves, as it seems to me, into two points. First, whether the provisions made by the different instruments are to be considered as portions; and,

secondly, whether, if they are to be so considered, it was or was not intended that both the provisions should take effect, regard being had in the consideration of this latter question to the leaning of this Court against double portions, which must prevail unless there be strong and clear proof of a contrary intention.

It is upon the second of these questions my difficulty in this case has arisen. The language of all the cases on this question of double portions is, that slight differences in the mode in which the provisions are made are not to be regarded, and are not sufficient to countervail the leaning of the Court against double portions; and from this language it is, I think, to be collected, that if the difference in the mode in which the provisions are made is not slight, but substantial, regard is to be had to that difference; the reason, as I conceive, being that where the difference is substantial it may reasonably be inferred that the provision made by the one instrument was intended to be wholly separate and distinct from and independent of the provision made by the other. Now, in this case nothing can well be more different than the limitations contained in the settlement and in the will, and I am not prepared to say that this would not of itself be sufficient to outweigh the leaning of the Court against double portions; but beyond this, there is in this will a trust for payment of debts and legacies preceding the trust for the division of the residue into moieties, and the testator must have known that under this trust for payment of debts the 10,000*l.* secured by the covenant would be payable, as he had been paying interest upon it. The case, therefore, is in substance this, that by *the very instrument by which one of these portions *346 is created, the other of them is directed to be paid, and it is, I think, going too far to apply the rule against double portions in a case so circumstanced. It is for these reasons, without entering more fully into the case, I find myself unable to concur with my learned brother in dismissing this appeal; but as his opinion agrees with that of the Vice-Chancellor, the appeal must, of course, be dismissed. I need hardly say that I think it should be dismissed without costs.

* 347 * MARTYR *v.* LAWRENCE.

1864. June 24. Before the LORDS JUSTICES.

A defendant appealed from a decree ordering him to pay the plaintiff's costs. The appeal was dismissed without costs, and the deposit ordered to be returned. The plaintiff, who had issued a *fi. fa.* for the costs of suit, applied for an order staying the repayment of the deposit to the defendant, but the application was refused.

IN this case the defendant had appealed from a decree of Vice-Chancellor WOOD. (*a*) Their Lordships differing in opinion, the appeal was dismissed without costs, and the deposit ordered to be returned.

The decree ordered the defendant to pay the plaintiff's costs. These costs were taxed and a *subpœna* issued. Payment not having been made, a writ of *fieri facias* was issued, but the sheriff had not yet made his return.

In these circumstances the plaintiff moved *ex parte* to stay the repayment of the deposit to the defendant.

Mr. Rolt and *Mr. Nalder*, in support of the application. — The plaintiff having an order for payment of his costs, which have been taxed, is in the position of a judgment creditor, and this money can be taken by the sheriff. (*b*) There is no case precisely in point, but we submit that the principle of *Watts* v. *Jefferyes*, (*c*) *Robinson* v. *Wood*, (*d*) and *Courtoy* v. *Vincent*, (*e*) governs the present case.

THE LORD JUSTICE KNIGHT BRUCE. — It appearing that
* 348 there is no precedent for the order * now asked, I must decline to take any part in making such a precedent.

THE LORD JUSTICE TURNER. — As my learned brother considers that the application ought not to be granted, no order can be made upon it, and it is unnecessary for me to give any opinion upon the matter. I am, however, rather inclined to the view that the plaintiff is entitled to the order he asks.

(*a*) *Supra*, 261.
(*b*) 1 & 2 Vict. c. 110, §§ 12, 14, 18; 3 & 4 Vict. c. 82.
(*c*) 3 Mac. & G. 372.
(*d*) 5 Beav. 388.
(*e*) 15 Beav. 486.

In the Matter of The OLD WHEAL NEPTUNE MINING COMPANY (LIMITED); and in the Matter of The COMPANIES ACT, 1862.

Ex parte PULBROOK.

Ex parte RAWLINGS.

1864. July 27. Before the LORDS JUSTICES.

The shareholders in a mining company within the jurisdiction of the Stannaries passed a resolution for a voluntary winding-up of the company, and appointed two liquidators. A creditor presented a petition for a compulsory winding-up, upon which the Vice-Warden made an order directing the voluntary winding-up to continue under the supervision of the Court, and substituting a new liquidator for one of those appointed by the resolution: *Held*, by the Lord Justice KNIGHT BRUCE, the Lord Justice TURNER doubting, that the Vice-Warden had jurisdiction to remove the liquidator appointed by the shareholders.

THIS case came before the Court on appeal petitions by Mr. Pulbrook from two orders of the Vice-Warden of the Stannaries.

The company was formed in May, 1862, as a company with limited liability, for the purpose of working a mine in Cornwall. Its affairs were carried on at a loss and nearly the whole of its capital was paid up.

Mr. Pulbrook was a shareholder in the company, had been its solicitor, and claimed to be a creditor. In September, 1863, he served a notice, requiring payment * of his debt, * 349 and on the 19th of February, 1864, presented a petition for a winding-up of the company by the Court. This petition came on to be heard before the Vice-Warden of the Stannaries on the 1st of March. It was suggested that the company was able to pay, and the petition was ordered to stand over till the 1st of May. Mr. Rawlings, who was also a creditor, appeared by his solicitor on that occasion, and did not oppose the adjournment.

The directors after this investigated the affairs of the company, and came to the conclusion that although its business could not be profitably carried on, its assets, if carefully and economically realized, would be sufficient to meet its liabilities, and they proposed a voluntary winding-up. On the 28th of April, a meeting

of shareholders was held, at which a resolution for a voluntary winding-up was duly carried, and a Mr. White and Mr. Pulbrook were appointed liquidators.

On the same 28th of April, Mr. Rawlings presented a petition for a winding-up by the Court.

Mr. Pulbrook's petition was again adjourned, and both petitions came on to be heard together on the 9th of May, 1864, when the Vice-Warden dismissed Mr. Pulbrook's petition without costs, and on Mr. Rawlings's petition made an order removing Mr. Pulbrook from the position of liquidator, and appointing Mr. Polkinghorne, a person approved of by a large number of the creditors, to be liquidator, along with Mr. White, and allowing the voluntary winding-up to continue under the supervision of the Court. His Honor considered that Mr. Pulbrook's position as contributory and creditor made him undesirable as a liquidator.

* 350 * Mr. Pulbrook appealed against both orders. A mass of evidence was entered into with reference to motives and conduct to which it is not necessary to advert, the only point calling for a report being the question as to the jurisdiction of the Court to remove Mr. Pulbrook.

Mr. Roxburgh, for the appellant. — I contend that Pulbrook's petition ought not to have been dismissed. It was first in order of date, and he was entitled to resort to this means of enforcing payment of his debt. The order for continuing the voluntary winding-up, if made at all, should have been on his petition; but I submit that on neither of these petitions, praying a compulsory winding-up, could the Court order a winding-up under the supervision of the Court. (*a*) The proper course, I contend, would have been to dismiss both petitions, Rawlings's with costs, as being unnecessary, and to order the company to pay the costs of Pulbrook's petition, which became ineffectual only by reason of the resolution of the company passed after it had been presented. I contend, further, that the Court had no jurisdiction to remove Mr. Pulbrook from being a liquidator. The statute (*b*) provides that where an order is made for continuing a voluntary winding-up under the supervision of the Court, the Court may appoint any additional liquidators. But the power of removal is expressly

(*a*) 25 & 26 Vict. c. 89, §§ 129, 133, 147.
(*b*) Sect. 150.

confined to the removal of liquidators appointed by the Court, and does not extend to those appointed by the contributories.

Mr. Brooksbank, for a majority of the shareholders, for some of the creditors and for Mr. White, supported the case of the appellant.

* *Mr. Speed* appeared for the company. * 351

Mr. Baggallay and *Mr. Rigby*, for Mr. Polkinghorne and a considerable body of creditors. — The Vice-Warden had authority to dismiss Pulbrook's petition, the priority of date not giving it any preference over that of Rawlings. (*a*) Then as to the removal of Mr. Pulbrook, there was jurisdiction. The words of sect. 147 of the Act are sufficient to confer it, and the 151st section, which gives the Court the same powers under a winding-up subject to supervision, as under a compulsory winding-up, enables the Court to remove any liquidator in the former case, as under sect. 93 it could do in the latter.

Mr. Roxburgh, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — I am of opinion that the Vice-Warden had jurisdiction to do what he has done in this case, and even had I been inclined to doubt whether he had exercised a sound discretion in making the orders which he has made, I should have felt reluctant to interfere with his discretion. In my judgment, however, he has rightly exercised it. The present appeals must be dismissed, and, if the Lord Justice concurs, with costs.

THE LORD JUSTICE TURNER. — I entertain no doubt that the Vice-Warden had jurisdiction to dismiss Mr. Pulbrook's petition, and I think that he properly dismissed it, since, under the circumstances, it is clear that its object was to give the control of the winding-up to the shareholders exclusively. Upon * the * 352 question whether the Court had jurisdiction to remove Mr. Pulbrook, I must admit that I feel considerable doubt, but the opinion of my learned brother being in accordance with that of the Vice-Warden, renders that doubt immaterial. I agree that the dismissal of both appeals should be with costs.

(*a*) 25 & 26 Vict. c. 89, § 86.

COUNTESS OF HARRINGTON *v.* SIR WILLIAM ATHERTON.

1864. November 7. Before the LORDS JUSTICES.

A fund was vested in trustees upon trust during the joint lives of husband and wife, to pay out of the income to the wife 200*l.* a year, and if she survived her husband, then during the rest of her life 500*l.* a year, and subject thereto upon trust for the husband. And the husband covenanted that if the income should become less than 500*l.* a year, he would add to the fund, so as to make up the income to that amount. The income during the husband's life was reduced below 500*l.* The husband by will devised his real estate to his wife for life, and directed his personal estate to be converted and invested in land to be settled to the same uses: *Held*, that the widow was entitled to have the annuity fund made up to 500*l.* a year, and then to have the husband's reversionary interest in it sold, and the proceeds invested according to the will.

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls.

The late Earl of Harrington, by the settlement made in 1831, in contemplation of his marriage with the plaintiff, covenanted with the trustees that, in case the marriage should be solemnized within six months, he would forthwith transfer to the trustees a certain Indian security for 113,500 rupees, upon trust either to continue the money in its then state of investment or convert the security and invest the proceeds as therein mentioned. It was then declared that the trustees should, during the joint lives of the Earl of Harrington and the plaintiff, by and out of the annual income of the trust premises, raise the annual sum of 200*l.* by equal quarterly payments, on the days therein specified, and pay it to the plaintiff for her separate use, without power of anticipation,
* 353 and * subject to the raising of this annual sum should, during the joint lives of the earl and the plaintiff, pay the income to the earl and his assigns, and if the earl should die in the lifetime of the plaintiff, the trustees should during the remainder of the life of the plaintiff, out of the annual income of the trust premises, raise the annual sum of 500*l.*, by equal quarterly payments, on the days mentioned for payment of the annuity of 200*l.*, and pay such yearly sum to the plaintiff or her assigns. And it was declared that, subject to the above trusts, the trust premises

and the income thereof should be held in trust for the earl, his executors, administrators, and assigns. The earl further covenanted with the trustees that in case at any time the trust premises, together with such other funds (if any) as might have been transferred under this covenant should not produce a clear yearly income of 500*l*., the earl, his executors, or administrators, would, at the request in writing of the trustees or trustee for the time being, pay or transfer to them or him so much money, stocks, or funds or such real securities for money as in the judgment of such trustees or trustee should be sufficient to yield, with the trust funds for the time being holden upon the trusts aforesaid, the clear yearly income of 500*l*. at the least.

The marriage was solemnized within six months, and the Indian security, which at the time produced more than 500*l*. a year, was duly transferred to the trustees.

The Earl of Harrington, by his will dated the 30th of November, 1861, devised his real estates to the use of the defendant Atherton and others for the term of one hundred years, to secure certain rent-charges, and subject thereto to the use of the plaintiff for life, remainder * to the use of the present Earl of Har- * 354 rington (an infant) for life, with divers remainders over. A power of sale in the usual form was given to the trustees, providing for the investment of the sale moneys in lands, to be settled to the same uses as the devised estates. The testator gave all his money, securities for money, goods, chattels, credits, and personal estate not thereinbefore otherwise disposed of to the trustees of the will, upon trust to call in and convert into money such parts as should not consist of money, and to apply the moneys, after payment of his funeral and testamentary expenses, debts, and legacies, upon the same trusts as were declared by the will concerning the moneys to arise from a sale of real estates under the power; and until such investment in land could be made the trustees were to invest such moneys in manner therein mentioned, the power including consols and railway stock. There was not any clause directing the trustees to suspend the conversion of reversionary interests.

The testator died in 1862. Previous to his decease the Indian security had been realized, and the proceeds invested in consols and railway stock, the income from which fell somewhat short of 500*l*. a year.

The case made by the bill was that the plaintiff was entitled to

have the settlement fund made up to such an amount as would produce 500*l.* a year, and then to have the funds sold subject to her life-annuity of 500*l.* a year, and to have the purchase-money invested according to the will: so that she, besides receiving the 500*l.* a year, would receive a further income from the proceeds of the sale of the reversionary interest.

The Master of the Rolls decided that the plaintiff was not entitled to have the reversionary interest sold, and from this decision the plaintiff appealed.

* 355 * *Mr. Selwyn* and *Mr. Charles Hall*, for the appellant. — It is clear that under a will framed like this the reversionary interests belonging to the testator ought to be sold. *Wilkinson* v. *Duncan*, (*a*) *Johnson* v. *Routh*. (*b*) The Master of the Rolls considered that this was not a reversion; but that makes no difference. There is an immediate trust for sale and conversion of all the testator's personalty, and under it a fund subject to a life-annuity must be sold subject to that annuity. According to the decision of the Master of the Rolls, the plaintiff does not get what the testator intended her to have, a life-interest in the whole of his residuary personalty.

Mr. Hobhouse, for the trustees of the will.

Mr. Bristowe, for the present Lord Harrington. — This was held by the Master of the Rolls, and I submit rightly held, not to be a reversionary interest. The fund is charged with an annuity, no life-estate being given in it. The whole of the instruments must be read together, and, according to the decision of the Master of the Rolls, the plaintiff gets all that was intended for her; namely, a life-interest in the whole of the testator's property. If she is to have this reversion, as she calls it, converted and invested, why may she not have the reversion in that investment sold and invested, and so on *ad infinitum* till she gets the whole *corpus?* The funds are already invested in securities authorized by the will for the investment of the personalty, and ought not to be disturbed.

(*a*) 23 Beav. 469.
(*b*) 3 Jur. N. S. 1041; 30 Law Times, 111, V. C. K.

Mr. Charles Hall, in reply. — The two instruments are not to be taken together. * The settlement is a matter of * 356 contract, and the rights which the plaintiff has under it do not in any way affect her rights under the will, which are precisely the same as if the annuity provided by the settlement had been provided for some one else instead of the plaintiff. The testator intended his residuary personalty, whether in possession or reversion, to be sold and invested, and the widow to have the income of that. This annuity fund is not part of the residuary estate, the testator was only entitled to the reversionary interest in it, subject to the annuity, and from this residuary interest she, according to the decision of the Master of the Rolls, derives no benefit.

THE LORD JUSTICE KNIGHT BRUCE. — I acknowledge myself with deference to the Master of the Rolls, to be with *Mr. Hall's* argument. The will gives a right to the widow to have the testator's interest, whether strictly reversionary or not, in this property, applied at once to the purpose of raising that fund to which she is entitled for life, without waiting till her own death. What is the most proper mode of giving her the benefit of this right may require some consideration.

THE LORD JUSTICE TURNER. — With all respect to the Master of the Rolls, I find myself unable to agree with the opinion he has formed on this case. The first question is, what was the intention of the testator expressed in his will? That the widow should enjoy the income of the whole of his residuary personal estate, which he has directed to be converted and invested in the purchase of lands of which she was to be tenant for life. Supposing this to be a clear case * of a fund settled upon the * 357 wife for her life leaving the reversion in the husband, the authorities conclusively establish that under a will framed like this will, the wife is entitled to have the reversion sold and the proceeds invested. It is urged, however, that this is not a case of tenancy for life and reversion; but if not, still it is a case where the intention of the testator was that his widow should have for life the income of all his personal estate; and whether the testator's interest was a reversion, or a fund charged with an annuity, that interest was a part of his personal estate, of which his widow

was to have the income. It is said that the fund is in the state of investment in which the residuary personal estate ought to be until it is invested in the purchase of land. It is true that the fund is in that state of investment; but it is not so invested for the purposes of the will, and that argument, therefore, appears to me to be entitled to no weight. The property is in such a state of investment as the testator contemplated, but the reversionary interest, which alone formed part of his personal estate at his death, is not invested as he directed. It is urged that if Lady Harrington is entitled to what she asks, she must, on the same principle, be entitled to have the reversion in the purchase-money sold; but that is not so, for when the reversion to which the testator was entitled has been sold under the trusts of the will, the direction for conversion has no further operation. With deference, therefore, to the Master of the Rolls, I am of opinion that the plaintiff is entitled to have the annuity fund made up to such an amount as to produce 500*l.* a year, and then to have the reversionary interest in it sold and the proceeds invested. An arrangement can no doubt be made for giving to the plaintiff the benefits to which she is thus entitled, without actually proceeding to a sale.

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* 358 * *In re* MACKINLAY.

WARD *v.* MACKINLAY.

1864. November 7, 15. Before the Lords Justices.

Where by consent of a mortgagee property is sold by the Court free from the mortgage security: *Semble*, that the costs of other parties of the sale ought not to be paid out of the proceeds of sale in priority to the mortgage debt; but whether they ought not to be so paid where the estate is so sold in an administration suit in which the mortgagee has proved for the whole mortgage debt, *quære*.[1]

This was an appeal by a mortgagee, not a party to the suit, from part of an order on subsequent further consideration in a suit to administer the estate of the mortgagor.

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1265, 1390, 1424.

The appellant, Maria Mackinlay, was mortgagee for 400*l.* of the reversionary interest of George Henry Mackinlay in one-fourth part of a sum of 3444*l.* 13*s.* 4*d.* reduced bank annuities, of which sum she was herself tenant for life under her marriage settlement.

G. H. Mackinlay having died, an order was made on summons for the administration of his estate, and by the chief clerk's certificate it was found that the outstanding personal estate of G. H. Mackinlay consisted (among other particulars therein mentioned) of his reversionary fourth share of the above sum of stock.

Maria Mackinlay was not a party to the cause; but having been served by the plaintiff with notice of the hearing of the cause for further consideration, appeared by consent, and by an order made on further consideration, dated the 16th day of April, 1857, it was among other things ordered, that the testator's personal estate mentioned in the second schedule to the chief clerk's certificate remaining unsold (which included this reversionary interest) should be sold, with the approbation of the Judge to whose Court the matter and cause were attached, free from the mortgage of the said Maria * Mackinlay, she by her * 359 counsel consenting to such sale, with liberty to the defendant and the said Maria Mackinlay to bid at such sale. And it was ordered that the money to arise from such sale of such part thereof as should arise from the property comprised in the said Maria Mackinlay's securities should be distinguished from the money to arise from the other personal estate, and be in the first place applied in payment of what should remain due to the said Maria Mackinlay in respect of her said securities. And it was ordered that the whole of the moneys to arise from the sale should in the mean time be paid into the bank, &c.

The appellant bid at the sale and became the purchaser of the above reversionary interest for 530*l.*, which was paid into Court and invested. The purchase-money was represented by 578*l.* 2*s.* 9*d.*, part of a larger sum of stock standing to the credit of the cause.

On the 30th of June, 1864, the cause came on for second further consideration, the appellant being served with notice and attending by counsel. The order directed that it should be referred to the taxing master to tax the plaintiff and defendant their costs on realizing the sale of lot 1, the part of the estate sold

to Maria Mackinlay, widow (being the above reversionary interest), and directions were given to carry over 578*l.* 2*s.* 9*d.* stock and 8*l.* 8*s.* 5*d.* cash to an account "proceeds of Maria Mackinlay's mortgage fund." And it was ordered that so much of the said 578*l.* 2*s.* 9*d.* bank annuities as with the said 8*l.* 8*s.* 5*d.* cash would raise the said costs should be sold, and the costs of the plaintiff and defendant paid, and the residue of the stock, with any subsequent directions, &c., be transferred to the appellant.

* 360 *Then followed provisions for payment of the costs of suit out of the general estate, and for payment of the residue to the appellant in part payment of the specialty debt fund due to her.

The 578*l.* 2*s.* 9*d.* stock and 8*l.* 8*s.* 5*d.* cash were insufficient to pay what remained due to the appellant on her security, the amount being above 600*l.*, and she by special leave presented her petition of appeal asking that the order might be varied by directing transfer and payment of the whole of the 578*l.* 2*s.* 9*d.* and 8*l.* 8*s.* 5*d.* to her without deduction of any of the costs incurred by the plaintiff and defendant about the sale.

Mr. Hobhouse and *Mr. F. G. White*, for the appellant. — The appellant might have filed a bill for foreclosure, and in that case she would have taken the fund in satisfaction of her debt and costs without any regard to the costs of other parties, and those costs ought not to be let in because she has come in and consented to a sale: *Hepworth* v. *Heslop*; (*a*) and we ask, as in that case, to have the whole of the fund arising from the sale transferred to the mortgagee, her debt having been found to exceed it in amount. There are cases in which where a mortgagee has filed a bill for general administration of the mortgagor's estate, or has come in and worked an administration suit, so as to receive a benefit to which he would not be entitled in a common foreclosure suit, the Court has let in the costs of other parties; but here there is no special circumstance except that the mortgagee obtained leave to bid; and the present order is unprecedented, and, as we submit, erroneous. *Chissum* v. *Dewes*. (*b*) *Cross* v. *General Reversionary Company* (*c*) affords an analogy in our favour.

(*a*) 3 Hare, 485.
(*b*) 5 Russ. 29.
(*c*) 3 De G., M. & G. 698.

* *Mr. Fleming* and *Mr. Jessel*, for a creditor. — In *Hep-* * 361
worth v. *Heslop* the Vice-Chancellor says, that special circumstances may take a case out of the ordinary rule, and here there are special circumstances. The mortgagee consented to the sale at the time of the order being made, so that the reasoning of the Vice-Chancellor does not apply here, there not being the usual option to sell subject to the mortgage. Where is the use of the mortgagee's consent, except to provide for the case of the proceeds of sale being insufficient for payment of all claims? It is true, that if this order had *not* been made, the mortgagee might have foreclosed; but, by taking proceedings for that purpose, she would have incurred an amount of costs far greater than those which the order of the Master of the Rolls throws upon the fund in priority to her claim. The question really is, whether this lady is to take the benefit of a sale conducted by other persons, and let them bear all the expenses of conducting it; thus receiving at their expense a much larger clear sum than she could have obtained had she taken proceedings of her own. As to the original order, "money to arise from such sale," must mean the moneys realized after paying the expenses of selling. The mortgagee obtained leave to bid, and took the benefit of the order by bidding and buying. Had she sold under a power, she could not have sold to herself; and she obtained an important advantage by the order in this respect, it being very desirable for her, as being tenant for life, to buy. *Berry* v. *Hebblethwaite*, (*a*) *Tuckley* v. *Thompson*, (*b*) and *Dighton* v. *Withers* (*c*) are all in our favour.

Mr. Selwyn, for the personal representative.

* *Mr. Hobhouse*, in reply. — If this decision is upheld, it * 362
will tend greatly to deter mortgagees from consenting to a sale, and this will be a great injury to the persons entitled to equities of redemption, for property sells much better when sold free from a mortgage. As to the original order, it says nothing about net proceeds, but makes the mortgage debt and mortgagee's costs the first charge on the proceeds; *i. e.*, the gross proceeds. As to the leave to bid, it was a term on which the mortgagee insisted as the price of consent, and it was for the advantage of every-

(*a*) 4 K. & J. 80.
(*b*) 1 J. & H. 126, 131.
(*c*) 31 Beav. 425.

body concerned, so it cannot be urged as a reason for taking the case out of the general rule.

Judgment reserved.

November 15.

The Lord Justice TURNER, after stating the facts of the case, proceeded as follows: —

On considering this case, it does not appear to me that it at all involves the question whether, in the case of a mortgagee not a party to the cause coming in and consenting to a sale of the mortgaged property, the actual costs of the sale incurred by the parties to the cause ought to be paid out of the proceeds of the sale to the prejudice of the mortgagee, for in this case the moneys to arise from the sale are by the order directing the sale ordered to be applied in the first place in payment of the mortgage. It was argued, indeed, on the part of the respondents, that this direction ought to be construed as applying only to the net proceeds of the sale after deducting the actual costs of it; but I do not think the order can be so construed, for the same words, "the moneys to arise from the sale," are by the order applied to the payment
* 363 into Court by the purchaser; and in * that case there could of course be no deduction in respect of the costs of the sale. The whole of the moneys to arise from the sale being thus by the order directing it devoted to the payment of the mortgage, I do not see how it could be competent to the Court by the subsequent order to direct the payment out of those moneys of the costs complained of by this appeal. Upon this short ground, therefore, my opinion is, that the direction for the payment of these costs must be struck out of the order complained of, and that the whole proceeds of the sale must be directed to be paid to the mortgagee.

Upon the general question, therefore, whether in the case of a mortgagee, party or not a party to the cause, consenting to a sale, the actual costs of the sale incurred by the parties to the cause ought to be paid out of the proceeds of the sale, it is not necessary, and the question not arising, it would not be right for us to give any final opinion; but as the point was discussed at the bar, and several cases were referred to upon it, it may be right for me to say, that I am not at present satisfied that these costs ought in such cases to be paid out of the proceeds of the sale. The sales

in such cases are for the benefit of the estates; and it seems to me rather hard upon mortgagees, that, because they consent to sales for the benefit of others, their securities should be saddled with costs to which they would not otherwise be liable. It is said, that the mortgagees in such cases adopt the suits, and get the benefit of their securities being realized; but they adopt the suits at the instance and for the benefit of other parties, and they might, and probably would, in many cases, be content to rest upon their securities, if the other parties did not desire the realization of them. I may observe, also, that this rule * of giving the * 364 parties their costs of the sale seems to be of modern introduction, and not warranted by the earlier authorities. I make these observations, however, without intending to give any decided opinion upon the question, and only from a desire that it may be further considered when it may again arise, for I think it of great importance to sales of estates in this Court that mortgagees should concur in them; and I am very apprehensive that, if the proceeds of the sales are to any extent to be subjected to the costs of the parties, they may be deterred from so doing. I need hardly add, that what I have said has no reference to cases in which the mortgagees themselves come to the Court for benefits to which they would not, without its aid, be entitled; and that I give no opinion how this particular case, independent of the special circumstance on which my judgment is founded, might be affected by the fact of the mortgagee having proved her whole debt under the decree, which she appears to have done. The order upon the appeal must be to strike out the direction for the payment of the costs of the parties, and to direct the whole proceeds of the sale to be paid to the mortgagee. There will be no costs of the appeal.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion.

* 365 * In the Matter of WAY'S TRUSTS; and in the Matter of the ACT FOR BETTER SECURING TRUST FUNDS AND FOR THE RELIEF OF TRUSTEES.

1864. November 18. Before the LORDS JUSTICES.

A person entitled to an equitable reversionary interest in a sum of stock made a voluntary assignment of it by deed to trustees. No notice was given of this deed either to the trustees named in it, or to any person interested under it, or to the original trustees of the stock; the assignor retained the deed and subsequently destroyed it, and made a different disposition by will of the fund, which was still standing in the names of the original trustees: *Held*, that unless the deed could be successfully impeached on the ground of fraud, mistake, or surprise, it operated as an effectual disposition of the fund, notwithstanding the absence of notice and the retention and destruction of the deed by the assignor.[1]

THIS was an appeal by the Attorney-General from an order made by the Master of the Rolls, who decided that a voluntary settlement of the 11th of May, 1852, was ineffectual.

At the time of the date of the voluntary settlement a sum of 2500*l.* old South Sea annuities (afterwards converted into reduced 3*l.* per cent annuities) was standing in the names of the trustees of a deed dated the 18th of November, 1820, upon trust for Susannah Mary Way, during her life, and after her death (subject to certain life-interests which determined in her lifetime) upon trust for Dame Catherine Cholmeley absolutely.

By a voluntary settlement dated the 11th May, 1852, and expressed to be made between Lady Cholmeley of the one part, and

[1] See Souverbye *v.* Arden, 1 John. Ch. 240; Bunn *v.* Winthrop, 1 John. Ch. 329; Jones *v.* Obenchain, 10 Grattan, 259; Tolar *v.* Tolar, 1 Dev. Eq. 456; Dawson *v.* Dawson, 1 Dev. Eq. 93, 396; Perry Trusts, § 104; Kekewich *v.* Manning, 1 De G., M. & G. 176, and note (1), and cases cited, 188, notes (1) and (2); 2 Sugden V. & P. (8th Am. ed.) 720, 721, and notes; 2 Dart V. & P. (4th Eng. ed.) 823, and note (*e*). In Souverbye *v.* Arden, 1 John. Ch. 256, it was said by Chancellor KENT that "a voluntary settlement fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed; and, even if he retains it, the weight of authority is decidedly in favour of its validity, unless there be other circumstances, besides the mere fact of his retaining it to show that it was not intended to be absolute." See also Uniacke *v.* Giles, 2 Moll. 257; Antrobus *v.* Smith, 12 Ves. 39; Perry Trusts, § 103.

certain persons therein named as trustees of the other part, Lady Cholmeley assigned the fund to these trustees upon certain trusts, for the benefit of her two sisters, the daughters of George Way, during their lives, and after the death of the survivor of such daughters, upon trust to assign the fund to the owner for the time being of the mansion-house called Denham Place, in the county of Bucks, and to the rector for * the time being of * 366 the church of Denham, for certain charitable purposes.

This settlement, which contained no power of revocation, was formally signed, sealed, and delivered by Lady Cholmeley in the presence of, and her execution thereof was attested by, her then solicitor, Mr. Thomas Sismey, who had prepared the deed by her instructions, and had on a previous occasion read over the draft to her and explained its contents to her. Lady Cholmeley kept the deed in her own possession, and the fact of its execution was never communicated to the trustees of the deed of 1820, or to the trustees nominated in the voluntary settlement, or to any person beneficially interested under that settlement, or, so far as appeared, to any other person.

On the 15th of April, 1863, Susannah Mary Way, the surviving tenant for life, died. Thereupon Mr. Sismey wrote to Lady Cholmeley to inform her that the fund might then be transferred to the trustees of the settlement of 1852, and to inquire whether those trustees were still living. In answer, Lady Cholmeley, on the 12th of May, 1863, wrote to Mr. Sismey as follows: —

"The deed of 1852 I destroyed, having made a codicil to my will concerning the 2500*l.* you mention; I believe the trustees are still living, but have to lament my sisters Miss Anne and Charlotte Way, who are both dead."

In reply, Mr. Sismey wrote to Lady Cholmeley as follows: —

"I fear the destruction of the deed of 1852 does not render it inoperative, and that it must be treated as still in existence; and if I am correct in the view I take of the matter, the trust fund must be paid over to the trustees of that deed."

* Lady Cholmeley, on the 29th of May, 1863, rejoined as * 367 follows: —

"I regret having delayed replying to your note of the 13th instant. The only difference I have made between the deed of 1852 and the codicil to my will is, that the latter leaves the stock between all the children of the late Rev. George Way and Mrs. George Way. There were three sons, the eldest is departed this life, leaving a son and two little daughters. I should be glad to know the view you take with regard to dealing with the 2500*l*., as I do not seem to understand it."

Nothing further passed between Lady Cholmeley and Mr. Sismey on the subject of the voluntary settlement, until her death, which took place on the 2d of February, 1864. She left a codicil, dated the 2d of March, 1857, by which she specifically bequeathed the fund in question to all the children of her late brother George Way who should be living at her decease, to be divided between them in equal shares.

In consequence of the doubt whether the fund passed under the voluntary settlement or under the codicil, the trustees of the deed of 1820 transferred the fund into Court under the Trustee Relief Act.

The children of George Way who were living at the time of Lady Cholmeley's death petitioned for transfer of the fund to them, and the Master of the Rolls made an order accordingly. From this order the Attorney-General, as representing the charitable gifts under the settlement of 1852, appealed.

The Attorney-General (Sir R. PALMER) and *Mr. T. H.*
* 368 *Terrell*, in support of the appeal. — * The judgment of the Master of the Rolls proceeded on the ground, that no notice of the assignment was given to the trustees. We submit that notice is not necessary to make an assignment complete, but only to exclude the title of third parties. The question as to the validity of a voluntary assignment of a *chose in action* has been put upon this: — has the assignor done all he could to make a complete assignment? We say that here the assignor has done all that was necessary on her part; the giving of notice is an act usually done by the assignee, and seldom or never by the assignor; and a notice given at any time before a fund is dealt with is sufficient, unless some other assignee has given prior notice. *Loveridge* v.

Cooper. (*a*) The present case is governed by *Sloane* v. *Cadogan* (*b*) and *Fortescue* v. *Barnett*. (*c*) *Meek* v. *Kettlewell*, (*d*) if at variance with those cases, is overruled by *Kekewich* v. *Manning*, (*e*) which is supported by *Blakeley* v. *Brady*; (*g*) it may, however, be distinguished on the ground that the subject matter there was a possibility, which is not the subject of assignment but only of contract, so that a valuable consideration is necessary to the validity of any dealing with it by act *inter vivos*. The Master of the Rolls followed his own decisions in *Bridge* v. *Bridge* (*h*) and *Beech* v. *Keep*, (*i*) which, as we submit, are at variance with *Sloane* v. *Cadogan* and *Kekewich* v. *Manning*. The retention of the deed by Lady Cholmeley does not affect its validity: *Fletcher* v. *Fletcher*; (*k*) and if it was once effectual its destruction is, of course, immaterial. *Donaldson* v. *Donaldson* (*l*) is in our favour.

* *Mr. Hobhouse* and *Mr. W. W. Karslake*, for the respon- * 369
dents. — In the circumstances of this case, there would have been no equity against Lady Cholmeley herself to enforce the settlement had she been still alive. All the circumstances must be considered to see whether the settlor intended the transaction to be binding at once. *Cecil* v. *Butcher*. (*m*) In all the cases where voluntary assignments of *choses in action* have been upheld, the transaction was intended to be complete as between the grantor and the grantee. Here Lady Cholmeley intended the arrangement to be purely private between herself and her solicitor, and to be incomplete until the death of the surviving tenant for life. The retainer of the deed by the settlor, coupled with the fact of its subsequent destruction and the absence of notice to the trustees of the deed of 1820, or to any beneficiary or trustee under the voluntary settlement, is conclusive evidence that she intended to reserve a power of revocation, or at any rate a control over the property. In such circumstances the Court has relieved against, or refused to act on a voluntary settlement. *Naldred* v. *Gilham*, (*n*) recognized in *Cotton* v. *King*, (*o*) *Boughton* v. *Boughton*, (*p*) and *Doe* d. *Garnons* v.

(*a*) 3 Russ. 30, 58.
(*b*) Sugden V. & P. 11th ed. 1119.
(*c*) 3 M. & K. 36, 42.
(*d*) 1 Hare, 464; 1 Phill. 342.
(*e*) 1 De G., M. & G. 176.
(*g*) 2 Dru. & Wal. *temp*. Plunkett, 311.
(*h*) 16 Beav. 315, 324.
(*i*) 18 Beav. 285.
(*k*) 4 Hare, 67.
(*l*) Kay, 711.
(*m*) Cecil *v*. Butcher, 2 J. & W. 565.
(*n*) 1 P. Wms. 577.
(*o*) 2 P. Wms. 358.
(*p*) 1 Atk. 625.

Knight, (*a*) and expressly followed in *Uniacke* v. *Giles*. (*b*) As to the cases cited on the other side, in *Fletcher* v. *Fletcher* the question was whether the legal liability created by the covenant could be enforced against the estate; in *Blakely* v. *Brady* there
* 370 was a power of attorney; in * *Fortescue* v. *Barnett* the deed was delivered to the trustees, and in *Donaldson* v. *Donaldson* (*c*) to the beneficiaries; in *Sloane* v. *Cadogan* and *Kekewich* v. *Manning* it was held that every thing had been done which could be done; and in *Kekewich* v. *Manning* there was notice; in that case, the question as to the absence of notice was expressly reserved, and *Meek* v. *Kettlewell* applies. At the time when Lady Cholmeley destroyed the deed she thought that by so doing she revoked it. This shows that the same notion was in her mind at the time when she executed and retained it. If the solicitor had asked her, as he ought to have done, *Nanney* v. *Williams*, (*d*) *Forshaw* v. *Welsby*, (*e*) whether she intended to bind herself absolutely or to have power to revoke the deed, she would have directed a power of revocation to be inserted. The impression on her mind at the time of execution, as to her power of revocation, being erroneous, the Court will relieve her estate although she is dead. *Phillipson* v. *Kerry*. (*g*) This relief may be given under the present petition, and it is not necessary to file a bill to set aside the deed of 1852.

Mr. Bristowe, *Mr. Haynes*, and *Mr. Springall Thompson* appeared for other parties.

The Attorney-General, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — Upon the materials
* 371 before the Court the deed of * 1852 must, in my judgment, be taken to have been duly and completely executed by Lady Cholmeley. There is no evidence before us that its execution was unfairly or improperly obtained, or that she executed it under any mistake, misapprehension, or erroneous advice. In these circumstances the deed must be supported, although no notice of it was

(*a*) 5 B. & C. 671.
(*b*) 2 Moll. 268; see Worrall v. Jacob, 3 Mer. 270.
(*c*) Kay, 711.
(*d*) 22 Beav. 452, 462.
(*e*) 30 Beav. 243.
(*g*) 32 Beav. 628.

ever given to the trustees or to any other person. That the deed was retained by Lady Cholmeley and afterwards destroyed by her, does not, in my judgment, alter the case. We are not now, however, at the hearing of a cause, the case coming before the Court only on a petition under the Act for the Relief of Trustees, and it is alleged that evidence can be adduced to show that Lady Cholmeley executed the deed under misapprehension, mistake, and erroneous advice. If the parties claiming against the deed desire an opportunity of filing a bill to impeach it on any of those grounds, I am not prepared to say that such an opportunity ought not to be given them; but if the case is to be decided on the evidence as it stands, I dissent with great respect from the view of the Master of the Rolls, and am of opinion that effect ought to be given to the deed.

THE LORD JUSTICE TURNER. — I am of the same opinion. I am not sorry that this case has been brought before us, as I have long anticipated, from the observations of Sir JAMES WIGRAM in *Meek* v. *Kettlewell*, (*a*) that the question must some day call for decision as to the effect of a voluntary settlement which has been retained by the grantor without notice of it being given to any person. I think that, according to the principle of the modern decisions, if * the deed is duly executed, effect must be given * 372 to it, notwithstanding the retainer and the absence of notice,[1] and it is satisfactory to me to find that in *Donaldson* v. *Donaldson* (*b*) the Vice-Chancellor Sir W. P. WOOD has taken the same view. In *Naldred* v. *Gilham*, (*c*) the circumstances were special. In *Ward* v. *Lant*, (*d*) *Birch* v. *Blagrave*, (*e*) and *Cecil* v. *Butcher*, (*g*) the deeds were executed for particular purposes of the grantors without any intention of benefiting the grantees.

Taking the facts as they stand, effect must be given to the deed, but leave will be given to file a bill to impeach it, if a desire so to do be stated to us within a fortnight.

(*a*) 1 Hare, 464.
(*b*) Kay, 711.
(*c*) 1 P. Wms. 577.
(*d*) Prec. Ch. 182.
(*e*) Amb. 264.
(*g*) 2 J. & W. 565.

[1] See Perry Trusts, § 105.

* 373 * BROOKE *v.* LORD MOSTYN.

1864. June 24, 25, 27, 28. November 21. Before the LORDS JUSTICES.

A compromise grounded on the supposed insufficiency of a real estate to pay an infant's legacy, and other legacies charged upon it, was sanctioned by the Court on behalf of the infant. It appeared that at the time of the inquiry as to the compromise being for the benefit of the infant, a document relative to the valuation of the estate — of a character rendering it doubtful whether the valuation, which throughout the inquiry was treated as correct, was not based on erroneous principles, so as to give an undervalue — was in the possession of the owners of the estate, but was not laid before the Master: *Held*, that the compromise must be set aside, for that it was the duty of the owners of the estate to bring the case fairly before the Master, and supply all material information which was in their possession, and that the case was not altered by his being satisfied with the materials before him, and not asking for further information.[1]

Per the Lord Justice TURNER: A compromise sanctioned by the Court on the part of an infant cannot be set aside by him on any ground which would be insufficient to set aside a compromise between persons *sui juris*. Whether it can always be set aside on grounds which as between parties *sui juris* would be sufficient, *quære*. In neither case can a compromise be set aside, unless there has been on the part of the person claiming the benefit of it conduct which in the view of a Court of Equity amounts to fraud.

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls dismissing his bill. The following statement of the facts is taken, with some abridgments, from the judgment of the Lord Justice TURNER: —

The suit was instituted for the recovery of a legacy of 20,000*l.* given by the will of Sir Thomas Mostyn, dated the 18th of June, 1818, by which he devised his Cors-y-gedol and Plas Hen estates to Sir Edward Pryce Lloyd (afterwards the first Lord Mostyn), Richard Parry, and Cynric Lloyd for the term of 500 years upon the trusts thereinafter mentioned, and (subject as regarded those estates to the term) he devised all his estates, in default of issue of his own body, to his nephew, the present Lord Mostyn (then

[1] See Stewart *v.* Stewart, 6 Cl. & Fin. (Am. ed.) 911, and note (1); Kerr F. & M. (1st Am. ed.) 124, 125, and cases in notes; Greenwood *v.* Greenwood, *ante*, 28, and cases in note (1); Nicholls *v.* Corbett, 3 De G., J. & S. 18, 23; 1 Story Eq. Jur. § 131.

Edward Mostyn Lloyd), for life, with remainder to his first and other sons in tail male, with remainder to his nephew Thomas Pryce Lloyd for life, with remainder to his first and other sons in tail male, with remainder to his nephew * Robert * 374 Williams Vaughan for life, with divers remainders over; and, in case the present Lord Mostyn should become entitled in possession to his devised estates, he bequeathed to his nephew Thomas Pryce Lloyd an annuity of 3000*l.* for his life, to commence on his attaining twenty-one, and he charged all his real estates in aid of his personal estate and of his Cors-y-gedol and Plas Hen estates with the payment of this annuity. The trusts declared of the term of 500 years were, by sale or mortgage or out of the rents and profits, to raise such moneys as should be sufficient to discharge all his debts, funeral expenses, legacies, and annuities, and in aid of and as an auxiliary fund to his personal estate not specifically bequeathed. And he gave the following legacies, namely, to each of his sisters, Essex Mostyn, Catherine Mostyn, and Mary Bridget Mostyn, the sum of 10,000*l.*, to be paid to them respectively if and when they should respectively marry, with a direction that until their respective marriages interest at four per cent should be paid to them upon their respective legacies, — to the first Lord Mostyn, 10,000*l.*; to Gryffyd Lloyd, 10,000*l.*; to Richard Parry, 10,000*l.*; to the said Cynric Lloyd, 15,000*l.*; and to Eliza Mostyn, 20,000*l.* (being the legacy sought to be recovered in this suit), to be vested in and paid to her when she should attain twenty-one or marry. He also gave some annuities and legacies to servants and dependents, and appointed Sir E. P. Lloyd, Richard Parry, and Cynric Lloyd to be his executors.

Cynric Lloyd, the legatee of 15,000*l.*, and one of the executors, died in the testator's lifetime. The testator died on the 17th April, 1831, without having had any issue. Upon his death his surviving executors, the first Lord Mostyn and Richard Parry, proved his will, and the present Lord Mostyn (then Edward Mostyn Lloyd) entered into possession of the devised estates, including * the Cors-y-gedol and Plas Hen estates * 375 comprised in the term.

Essex Mostyn, one of the legatees of 10,000*l.* under the will, also died in the testator's lifetime, so at the testator's death there was payable in respect of legacies, independently of the legacies to

servants and dependents and of the contingent legacies to Catherine Mostyn and Mary B. Mostyn, the sum of 50,000*l.*, being the amount of the legacies to the first Lord Mostyn, to Gryffyd Lloyd, to Richard Parry, and to Eliza Mostyn. Payments were, it appeared, made by the executors and by the present Lord Mostyn in respect of these legacies. The legacies to servants and dependents were paid, and the legacy duty was paid on the other legacies. Interest was also paid for several years on these other legacies, and as to some of them payments or advances were made in respect of principal. In the year 1834, Richard Parry, one of the legatees of 10,000*l.* and one of the executors under the will, died, having by his will appointed the first Lord Mostyn, John Greathead Harris, and the present Lord Mostyn to be his executors, who duly proved his will.

In the year 1840, a suit was instituted in the Court of Exchequer by the present Lord Mostyn as plaintiff against the executors and trustees and the legatees under the testator's will for the administration of the testator's estate, in order to settle and ascertain the extent to which his assets were liable for the payment of his legacies, but in consequence of the legacies having been subsequently released as after mentioned, this suit appeared to have been dropped.

In the same year (1840), Eliza Mostyn, the legatee of 20,000*l.*, married Captain Brooke, and by their marriage settlement, dated the 2d June, 1840, after reciting, amongst other things, * 376 that the personal estate of Sir * Thomas Mostyn was found to be insufficient for the payment to Eliza Mostyn of her legacy of 20,000*l.*, and that the same remained due to her under the trusts of the term of 500 years, but that the legacy duty payable in respect thereof had been paid, and that a suit was then pending in the Court of Chancery (meaning, it should seem, the suit in the Court of Exchequer), in which it was sought to obtain the administration of the testator's estate subject to his unpaid debts and legacies, under the direction of the Court, Eliza Mostyn assigned and Captain Brooke confirmed to Edward Hyde Clarke and George Rochfort Clarke the legacy of 20,000*l.* and all interest to become due for the same, upon trust to invest the legacy when received, and to stand possessed thereof in trust (after life-estates to Mrs. and Captain Brooke) for the child or children of the marriage who, being a son or sons, should attain twenty-one, or a

daughter or daughters, should attain that age or be married. In this settlement there was contained a proviso that, notwithstanding the trusts therein contained for the investment of the legacy, the trustees might permit it or any part of it to remain on its then present state of investment, so long as they should think advantageous. Charles Hyde Brooke, the plaintiff in the present suit, was the only child of this marriage.

Early in the year 1842, the first Lord Mostyn, then the testator's only surviving executor, presented a memorial to the commissioners of stamps and taxes, praying that the legacy duty which had been paid upon the legacies might be repaid to him. This memorial proceeded upon the ground that there were no assets for the payment of the legacies. The statements contained in it were that the value of the testator's personal estate at the time of his death was 53,129*l.* 10*s.* 9*d.*; that the rental of the estates comprised * in the term of 500 years was 5027*l.* * 377 1*s.* 2*d.*, and that the value of those estates, calculated at twenty-one years' purchase, was 105,568*l.* 18*s.* 1*d.*; that those estates were subject to mortgages amounting to 105,000*l.*, and that the debts due from the testator at the time of his death (exclusive of mortgage debts) amounted to 112,238*l.* 3*s.* 7*d.*, so that the personal estate (including the value of the estates comprised in the term) was not sufficient to discharge the incumbrances on these estates and the testator's specialty and simple-contract debts. The memorial also stated that the testator's other estates devised in strict settlement were not charged with the payment of the legacies and annuities or any of them, except the annuity of 3000*l.*, and it set forth the opinion of counsel that the Cors-y-gedol and Plas Hen estates alone were charged with the payment of the debts, legacies, and annuities, except the annuity of 3000*l.*, which was charged on all the devised estates, and that the trustees and executors were bound to pay out of the personal estate and the Cors-y-gedol and Plas Hen estates, the testator's bond and simple-contract debts before they proceeded to the payment of the legacies and annuities, and that the legatees and annuitants had no right as against the devisees of the estates devised in strict settlement to throw the debts, whether by specialty or simple contract, not being mortgage debts, on those estates. The commissioners of stamps and taxes, in answer to this memorial, required the first Lord Mostyn to show by a release from the

legatees that no money had been paid to them, and that they could make no claim thereafter upon the estates or parties for the legacies, and also required that there should be the usual affidavit of the transaction being *bonâ fide*, before the duty was returned. In consequence of this requisition, application was made to the legatees to release their claims, and thereupon in the
* 378 * months of April, June, and July, 1842, Gryffyd Lloyd, the executors of Richard Parry, and Mary B. Mostyn, by deeds-poll under their hands and seals, reciting that the personal estate of the testator, together with the Cors-y-gedol and Plas Hen estates, devised for the term of 500 years for the payment of his debts and legacies, had been found to be insufficient for the payment of his debts respectively, released all the testator's real and personal estate from the legacies given to them, Gryffyd Lloyd, Richard Parry, and Mary B. Mostyn respectively, and from all interest thereon and all claims and demands in respect thereof. Some time, however, before the execution of the deed-poll, which was executed by Mary B. Mostyn, the present Lord Mostyn had executed an indenture, dated the 28th day of January, 1841, and made between him of the first part, Catherine Mostyn (who died after the date of this indenture and before the execution of the deed-poll) of the second part, and Mary B. Mostyn of the third part, whereby after reciting that the testator's personal estate and the Cors-y-gedol and Plas Hen estates, for the term of 500 years, were wholly insufficient to satisfy the testator's debts, and that there were, therefore, no funds or estates out of which the legacies given by the will could be paid, he covenanted and agreed that in case Mary B. Mostyn should marry he would pay or by his bond or by mortgage of some of his estates, if thereto required, secure to be paid to Mary B. Mostyn the sum of 10,000*l.*, and further that he would pay to her during such time as she should continue unmarried, and after her marriage until the 10,000*l.* should be paid, interest upon the 10,000*l.* from the 17th of October then last (to which time the same had been paid or secured); and he also entered into the like covenant and agreement with Catherine Mostyn; but it was provided by the indenture that in case
* 379 the sums of 10,000*l.* should respectively * become payable, and the present Lord Mostyn should be desirous that the same should respectively remain owing on his covenant, bond, or mortgage, Catherine Mostyn and Mary B. Mostyn would not require

the same to be paid during their respective lifetimes. It appeared also that before the date of the deed-poll executed by Gryffyd Lloyd some payments had been made to him by the present Lord Mostyn on account or in respect of his legacy, and that Richard Parry had been largely indebted to the testator's estate and had also in his lifetime received some payment on account or in respect of his legacy.

In July, 1842, a private Act of Parliament was passed on the petition of the present Lord Mostyn, by which, after reciting that the testator was at the time of his death indebted to a large amount in mortgage-bond, specialty, and simple-contract debts, and that the Cors-y-gedol and Plas Hen estates, charged by his will with the payment of his debts, expenses, legacies, and annuities, were mortgaged to a large amount in the testator's lifetime, and that several other estates of the testator devised by his will were subject to mortgage debts of the testator to a large amount, and that the first Lord Mostyn had out of his own moneys paid several debts of the testator and several expenses attending the carrying into execution the trusts of his will which had not been repaid, and that the personal estate of the testator was wholly insufficient to pay his mortgage-bond, specialty, and simple-contract debts, and that the Cors-y-gedol and Plas Hen estates, devised for the term of 500 years upon trust to be sold or mortgaged in aid of his personal estate, if further mortgaged or sold for the term of 500 years
* would not raise a sufficient sum to pay the mortgage-bond, *380
specialty, and simple-contract debts, and that the fee-simple
of the estates comprised in the term of 500 years, and also the other estates devised and settled by the will of the testator, were subject to the payment of his mortgage-bond and specialty debts; and that it was desirable and would be for the benefit of the present Lord Mostyn and his infant sons and the persons entitled in remainder under the will that the bulk of the Cors-y-gedol and Plas Hen estates should not be sold if the sale thereof could be avoided, and that provision should be made for payment of the debts, expenses, legacies, and annuities by the will charged upon the term of 500 years created in the Cors-y-gedol and Plas Hen estates so far and to such extent only as the debts, expenses, legacies, and annuities so charged upon the term ought to be paid according to the trusts of the will, and also that provision should be made for payment of the mortgage-bond and specialty debts of the testator, and that such provision should be made by the sale or

mortgage of detached parts of the Cors-y-gedol and Plas Hen estates and of detached parts of other unconnected and distant estates devised by the will, and also of other estates devised by the will which were detached and lying at a distance from the principal mansion-house and demesne lands of Mostyn (being the estates comprised in the first schedule to the Act), and that if the moneys to arise from such sales should not be sufficient for the purposes aforesaid, then such provision should be made by the sale or mortgage of the mansion-house and bulks of the Cors-y-gedol and Plas Hen estates (being the estates comprised in the second schedule to the Act), or so much thereof as should be necessary for the purposes aforesaid, and that the moneys which should arise
* 381 from such sales should be * applied under the direction of the Court of Chancery, in paying the debts, expenses, legacies, and annuities so charged upon the term, so far and to such extent as the same ought to be paid as aforesaid, and in paying the mortgage bond and specialty debts of the testator; and that it was also desirable and would be for the benefit of the present Lord Mostyn and his infant sons and the other persons entitled in remainder under the will that other estates devised by the testator which were detached from or inconveniently held with the mansion and demesne of Mostyn, or which might be conveniently exchanged for other lands and hereditaments (being the estates comprised in the third schedule to the Act), should be sold, or exchanged for other lands and hereditaments, and also that the lands and hereditaments which should be purchased or taken in exchange or certain parts thereof should be again sold or exchanged in like manner as the estates devised by the testator, in case it should be expedient to sell or exchange the same or any part thereof, and that the moneys to arise from such sales and exchanges should, under the direction of the Court of Chancery, either be laid out in paying and discharging the mortgage-bond and specialty debts of the testator, or should be laid out and invested in the purchase of other freehold lands and hereditaments, and that the lands and hereditaments purchased or taken in exchange should be conveyed and settled to the uses of the testator's will: It was enacted by section 1, that the estates comprised in the schedules to the Act should be discharged from the uses and trusts of the testator's will and should be vested in Thomas Pryce Lloyd, Cynric Lloyd the younger, and John Hancock Hall, upon trust, as to the estates in the first and

second schedules, either to mortgage the same for any sum or sums of money or to sell the same; and as to the estates in the third * schedule, to sell or exchange the same. And it * 382 was enacted by section 6, that all moneys received from any sale or mortgage made in pursuance of the Act, and which should not be applied in discharge of any mortgages on the premises sold or mortgaged, should be paid into the Court of Chancery; and by section 7, it was enacted that the moneys so to be paid into Court should be applied, under the direction of the Court, in the first place in payment of the costs, charges, and expenses attending the obtaining the Act, and attending the sales, mortgages, or exchanges thereby authorized to be made, and the execution of the trusts and powers thereby created, and in the next place, as to the moneys to arise from the mortgage or sale of the property comprised in the first schedule and from the mortgage or sale of the property comprised in the second schedule, after discharging any mortgages thereon, in paying the debts, expenses, legacies, and annuities charged by the will upon the term of 500 years created in the Cors-y-gedol and Plas Hen estates, but so far and to such extent only as the debts, expenses, legacies, and annuities so charged upon the term ought to be paid under the trusts of the will, and in the next place, in paying the mortgage-bond and specialty debts of the testator, and also the costs, payments, and expenses of the first Lord Mostyn and the executors in paying the debts of the testator and the expenses of carrying into execution the trusts of his will, but as to such costs, payments, and expenses in the like order in which other like creditors would be entitled to receive such costs, payments, and expenses, and so far and to such extent only as such costs, payments, and expenses might be chargeable upon the lands, tenements, and hereditaments devised by the will of the testator. By section 8 of the Act, the rents and profits till the sales were to be paid to the person who should be entitled to the rents of the * purchased premises; and by section 11 it was * 383 enacted, that, notwithstanding any thing in the Act contained, Thomas Pryce Lloyd and Robert Williams Vaughan should continue entitled to receive the annuities given to them respectively by the will of Sir Thomas Mostyn, by and out of the properties made subject thereto, except such parts thereof as should have been disposed of by way of sale or mortgage, under the powers of the Act, for the purpose of paying debts, legacies, or annuities.

There was also a clause in the Act saving the rights of all persons, except the devisees under the will, and all and every other person or persons whomsoever having or claiming, or who might have or claim, any estate, right, title, interest, use, trust, charge, or incumbrance whatsoever of, in, to, out of, or upon the property by this Act vested as aforesaid, or any part thereof, under and by virtue of the will of Sir Thomas Mostyn, other than any person or persons claiming or to claim under any mortgage or mortgages which might have been made or executed under the trusts of the term of 500 years.

The Cors-y-gedol and Plas Hen estates, with several other large estates, were comprised in the first and second schedules to this Act, and thus became liable to be sold in fee. These estates, however, and the testator's personal estate, were, it will be observed, still remaining charged with Eliza Mostyn's legacy of 20,000*l*., which had been put into settlement upon her marriage with Captain Brooke.

In August, 1842, the present Lord Mostyn applied to Captain Brooke for a release of all claims in respect of this legacy. Captain Brooke, it appeared, upon this application being made to him, desired to consult upon the subject Messrs. Jones Bateman & Bennett,
* 384 who * had been the solicitors of the testator and of Mrs. Brooke, before her marriage, but differences had at this time arisen between them and the present Lord Mostyn, and in consequence of such differences the present Lord Mostyn objected to their being consulted on the matter, and desired Captain Brooke to consult his own solicitor. He accordingly consulted Messrs. Whishaw, who had acted for him on the occasion of the preparation of his marriage settlement. The release of this legacy was ultimately carried into effect, under the advice of Messrs. Whishaw, in the following manner. In November, 1842, a bill was filed in chancery by Captain Brooke and his wife and the present plaintiff, their only child, who was then an infant, against the first Lord Mostyn, the present Lord Mostyn, Thomas Edward Mostyn, Lloyd Mostyn, his eldest son, as the tenant in tail of the testator's devised estates, and the trustees of the marriage settlement, for the recovery of the legacy of 20,000*l*., and after the defendants had appeared to the bill, a petition in the cause was presented by the plaintiffs stating, among other things, "That no part of the said legacy of 20,000*l*. so bequeathed to your petitioner Eliza Brooke has ever

been paid or satisfied, and that no accounts have been directed or taken in the said suit so instituted as in the said indenture of settlement and hereinbefore mentioned" (the above-mentioned suit in the Exchequer), "and all proceedings therein have been stayed," — and then stating that the first Lord Mostyn and the present Lord Mostyn had represented to the petitioners that the testator was at his death largely indebted in mortgage-bond, specialty, and simple-contract debts, and that the Cors-y-gedol and Plas Hen estates, charged by the testator's will with the payment of his debts, funeral expenses, legacies and annuities, and comprised in the term of 500 years, were mortgaged to a large amount in the lifetime of the testator; and that not * only was the personal estate of the * 385 testator wholly insufficient for the payment of the legacy of 20,000*l.*, but that even if the hereditaments comprised in the term of 500 years, and so devised as thereinbefore mentioned in aid of and as an auxiliary fund to the personal estate had been sold, the same would not have raised a sum even sufficient to pay the debts and incumbrances affecting the same; and that in fact there was no fund or estate applicable, according to the trusts and intent of the will, to the payment of the legacy of 20,000*l.* or any part thereof. The petition further stated that, as evidence of the truth of such representations, the first Lord Mostyn and the present Lord Mostyn relied upon the above Act of Parliament (which was stated in the petition), and insisted that the legacy of 20,000*l.* was not a sum which ought to be paid under the trusts of the will within the meaning of the Act of Parliament; and alleged that the sum paid by the first Lord Mostyn for the legacy duty in respect of the sum of 20,000*l.* was paid by him in ignorance of the real state of the assets of the testator, and under the full belief and expectation that the same would be sufficient for the payment of all his debts and legacies. Then the petition stated that the present Lord Mostyn was, notwithstanding, willing to make a provision for the petitioners in lieu of the legacy of 20,000*l.*, which, he alleged, had, under the circumstances before mentioned, failed of effect, but that he was desirous of having the real and personal assets of the testator released from any claim on account of it, and that he had accordingly proposed to the petitioners that the suit should be compromised and that all proceedings therein stayed upon the terms after mentioned, namely, that the petitioners, Captain Brooke and his wife, and the trustees of their settlement, should

release the first Lord Mostyn and the present Lord Mostyn
* 386 and the real and personal estate of the * testator from the legacy; and that the present Lord Mostyn should execute a deed for securing to the trustees of the settlement the payment of 20,000*l.*, with interest at four per cent per annum, at the times and in manner after mentioned, namely, that the present Lord Mostyn would on or before the 20th of January, 1851, pay to the trustees upon the trusts of the settlement 20,000*l.*, or would on or before that day effectually secure the payment thereof, with interest at the rate of four per cent per annum, to the trustees by a conveyance to them by way of mortgage of estates of sufficient clear value for an estate of inheritance in fee-simple or for a term of not less than 1000 years, so that the sum of 20,000*l.* should be vested in the names of the trustees of the settlement on real securities in the same manner, as near as might be, as if it had been paid and re-invested in such real securities, according to the intent of the marriage settlement, with a proviso that in every such mortgage there should be contained a power to Lord Mostyn to substitute other lands of sufficient value for the lands contained in such mortgage, and that Lord Mostyn would covenant with the trustees of the settlement that he would, until the 20,000*l.* was paid or secured in manner aforesaid, pay to the trustees interest on the 20,000*l.*, or on the unpaid part thereof, at the rate of four per cent per annum, and that he would at all times before the 20th of January, 1851, pay to the trustees such parts of the 20,000*l.* as the trustees should from time to time be required to pay under the trusts of the marriage settlement; and that Lord Mostyn should indemnify the trustees from all damages which might arise by reason of their executing a release of the legacy. The petition then proceeded to state that the petitioners were satisfied of the truth of the statements of the late Lord Mostyn and the present Lord Mostyn, and that
* 387 the recitals contained in the Act of Parliament * were according to the fact, and that they were advised that, considering the nature and extent of the liabilities affecting the estate of the testator, the suit could not be prosecuted without very great delay and expense, and that even if the same were prosecuted, no part of the legacy of 20,000*l.* would ultimately be recovered,—that under these circumstances the terms of compromise proposed by Lord Mostyn were very favourable to the petitioners, and that it would be of great advantage to them and to all who might be

interested under the indenture of settlement, that the same should be accepted and carried into effect. But that nevertheless the defendants, the trustees, refused to execute any release of the legacy of 20,000*l.*, or to concur with the petitioners in carrying the proposed compromise into effect, except under the direction of the Court. The petition prayed that it might be ordered that the present Lord Mostyn should execute a deed to the effect stated in the petition for securing the 20,000*l.* and the interest upon it, and that on the execution of that deed the trustees of the settlement should execute a proper release of the legacy of 20,000*l.* By an Order of the 17th of February, 1843, it was referred to the Master to inquire whether it would be fit and proper and for the benefit of the infant petitioner (the present plaintiff) that the proposal mentioned in the petition should be carried into effect.

The plaintiffs under this order carried in before the Master a state of facts which was in substance to the same effect as the stating part of the petition, and this state of facts was supported by an affidavit of the first Lord Mostyn, sworn the 31st of January, 1843, by which he deposed that the testator was at the time of his death indebted to various persons in specialty and simple-contract debts to the amount of 110,000*l.* and * upwards, * 388 exclusive of sums of money charged by way of mortgage on the estates devised by the will and not comprised in the 500 years' term, and that the Plas Hen estate was mortgaged for 60,000*l.* and the Cors-y-gedol estate for 45,000*l.*, and that the value of the testator's personal estate at the time of his death amounted to 53,000*l.* or thereabouts, but that a large proportion thereof, amounting to 10,000*l.* or thereabouts, had not been and could not then be realized, and that the sums which had been realized in respect of the personal estate amounted to 41,000*l.* or thereabouts, and that the value of the Plas Hen and Cors-y-gedol estates comprised in the term of 500 years had been estimated by competent persons at the sum of 151,800*l.* at the greatest estimate, and that the testator's personal estate, including the value of the estates comprised in the term, was wholly insufficient to discharge the incumbrances thereon and the specialty and simple-contract debts due from the testator at the time of his death, and that the other estates devised by the testator in strict settlement were not charged with the payment of the legacies and annuities,

except the annuity of 3000*l.*; and after stating the opinions of counsel to the same effect as stated in the memorial, and also stating the Act of Parliament, he further deposed that he had not received the legacy of 10,000*l.* given to him by the will in consequence of there being no assets to pay the same, and that he did not expect to receive the same or any part thereof; and he further stated the deaths of Essex Mostyn and Catherine Mostyn, without having been married, and that Mary B. Mostyn, Gryffyd Lloyd and the representatives of Richard Parry had released the testator's estate from all claims in respect of their legacies. The state of facts was further supported by an affidavit of Cynric Lloyd the younger, the auditor of the estates of the present
* 389 Lord Mostyn, who stated that he * was well acquainted with the testator's affairs, and deposed as to his debts and assets to the same effect as the first Lord Mostyn, and further deposed that he was well acquainted with the Plas Hen and Cors-y-gedol estates, and that they had been estimated by competent persons at the sum of 151,000*l.*, and that he believed that sum to be the utmost value of those estates, and that he had carefully examined the accounts and estimates connected with the real and personal estates of the testator, and that the personal estate and the Plas Hen and Cors-y-gedol estates were wholly insufficient to discharge the debts due from the testator and the incumbrances affecting the last-mentioned estates. There was also the necessary formal evidence in support of the state of facts, and the marriage settlement and Act of Parliament were produced before the Master.

On the 14th of March, 1843, the Master made his report in pursuance of the order of reference, and thereby, after referring to the state of facts and to the evidence in support of it, and finding the facts to be as alleged in the state of facts, he certified that he was of opinion and found that it would be fit and proper and for the benefit of the infant plaintiff that the proposal in the petition and report mentioned for the compromise of the suit should be carried into effect. By an order made in the cause on the petition of the plaintiffs, and bearing date the 17th of March, 1843, the report was confirmed, and it was ordered that the defendant Edward Mostyn Lloyd Mostyn (the present Lord Mostyn) should execute a deed to the purport and effect mentioned in the

report for securing to E. H. Clarke and G. R. Clarke, as trustees of the settlement of Mrs. Brooke, the due payment of 20,000*l.* and interest thereon at the times and in the manner mentioned in the report; and it was ordered that upon the execution of this deed the trustees * E. H. Clarke and G. R. Clarke * 390 should release the estates from Mrs. Brooke's legacy of 20,000*l.*

In pursuance of this order an indenture, dated the 20th of March, 1843, was made between the present Lord Mostyn of the first part, the trustees of the settlement of the second part, and Captain Brooke and his wife of the third part, by which it was recited that the first Lord Mostyn, as surviving executor and surviving trustee of the term of 500 years, and the present Lord Mostyn, as tenant for life in remainder of the estates comprised in the term, had represented to the trustees of the settlement that the personal estate and the estates comprised in the term of 500 years were insufficient to pay the bond and specialty debts of Sir Thomas Mostyn, and that there was no fund or estate applicable, according to the trusts of the will, to the payment of any part of the legacy of 20,000*l.*, but that no accounts had yet been made out by the first Lord Mostyn and by the present Lord Mostyn to prove to the trustees of the settlement the insufficiency of the estates of Sir Thomas Mostyn to pay the bond, specialty debts, legacies, and annuities. And it was further recited that the first Lord Mostyn and the present Lord Mostyn had paid to Eliza Brooke interest on the legacy after the rate of four per cent per annum up to the date of the deed, and that the first Lord Mostyn, as such executor, had paid the sum of 2000*l.* for legacy duty in respect of the sum of 20,000*l.*, and was desirous to obtain the repayment of the sum of 2000*l.*, on the ground that there were no assets of Sir Thomas Mostyn applicable, according to the trusts of his will, to the payment of the legacy, and that the commissioners of stamps and taxes were willing to repay to the first Lord Mostyn the 2000*l.* on his obtaining the release, but that he was wholly unable to * obtain the repayment of that * 391 sum without the execution of a release by the trustees, and that he was desirous that the legacy of 20,000*l.* should be eventually paid to Eliza Brooke and her trustees, but that the payment thereof would be resisted by the present Lord Mostyn and the first Lord Mostyn, in case any suit or proceedings were prosecuted

by the trustees for the payment thereof, and that Captain Brooke and his wife were satisfied that it would be greatly prejudicial to them if any suit or proceedings should be prosecuted or proceeded with for the recovery of the legacy, and that they had therefore under the provisions of the settlement required the trustees of the settlement that no suit or proceeding should be proceeded with for the recovery of the legacy. And it was further recited that it would be greatly beneficial to the first Lord Mostyn in the settlement of his executorship accounts, and to the present Lord Mostyn in the sale and disposal of the assets comprised in the term of 500 years under the trusts of the Act of Parliament, if a release were obtained from the legacy of 20,000*l.*, and that the present Lord Mostyn accordingly proposed to the trustees and to Brooke and his wife that they should execute a release of the legacy of 20,000*l.*, and that in consideration thereof he the present Lord Mostyn should enter into the covenants thereinafter contained for securing to the trustees the payments of the sum of 20,000*l.* upon the trusts of the settlement at the time and in the manner after expressed, and that the trustees of the settlement had agreed to execute the release. Then it recited the release, and then Lord Mostyn covenanted that he would, on or before the 20th of January, 1851, pay the 20,000*l.* or secure it by mortgage of real estate, and the trustees covenanted that if any part of the 20,000*l.* should be required to be paid they would not take any proceedings for compelling the payment, unless ordered so
* 392 to do by some Court; and that * the present Lord Mostyn should have the defence of any suit, which shall be instituted for the purpose of compelling them to require payment of the 20,000*l.*

Captain Brooke and his wife and the trustees of their settlement had before the execution of this indenture released the legacy of 20,000*l.* by deeds-poll, dated respectively the 14th and 15th March, 1843. That executed by Captain and Mrs. Brooke contained the following recitals: Whereas the personal estate of the said Sir Thomas Mostyn, together with the said estates called Cors-y-gedol and Plas Hen so devised by the said recited will for the term of 500 years for the payment of the said testator's debts and legacies, have been found to be insufficient for the payment of such debts; and whereas the said Charles C. Brooke and Eliza his wife, being satisfied of the insufficiency of the said testator's personal estate

and of his said estates called Cors-y-gedol and Plas Hen so devised for the said term for the payment of the said testator's debts, have agreed to execute such release and discharge as hereinafter contained."

After the above-mentioned releases had been executed, two further memorials were presented by the first Lord Mostyn to the commissioners of stamps and taxes for the return of the legacy duty. These memorials stated the releases and set forth further opinions of counsel as to the non-liability of the testator's devised estates not comprised in the term to the payment of the legacies and annuities, and in one of them it was stated that no legacy bequeathed by the testator's will, nor any interest or payment in respect of such legacy, nor any annuity, had been paid by any of the executors of the testator, and that there was not, to the knowledge or belief of the memorialist, any deed, document, or other instrument executed by the testator, or on his behalf, which * would confer any right or claim, or give any title, legal or * 393 equitable, to any of the legatees or annuitants mentioned in the testator's will, except the will, or any deed, document, or instrument whatsoever executed by the testator or on his behalf mentioning, relating, or in any wise referring to the legacies or annuities or any of them, except the will, and that the memorialist had not, as the testator's surviving trustee or executor, or in any other capacity, executed any such deed, document, or other instrument, and that no such deed, document, or other instrument had ever been executed by any of the executors or trustees of the testator to the knowledge and belief of the memorialist. The legacy duty was not repaid under these further memorials, but it was afterwards, and after the sales under the Act of Parliament in the year 1844, about to be mentioned, repaid upon a memorial presented by the first Lord Mostyn to the commissioners of the treasury.

In June, 1844, one of the estates comprised in the first and second schedules to the Act, but not comprised in the 500 years' term, was sold under the Act for 64,000*l.*, and in October, 1844, the principal part of the Plas Hen estate was also sold under the Act by public auction in lots for sums amounting to 162,297*l.* 11*s.* The remainder of this latter estate was likewise afterwards sold under the Act in the year 1848 for sums amounting to 25,085*l.* 4*s.*, so that the proceeds of the sale of the Plas Hen estate alone amounted in the whole to 187,882*l.* 15*s.* No further sales of the

estates comprised in the first and second schedules to the Act appeared to have been conpleted under the Act, for in the year 1851 the Honourable Thomas Edward Mostyn Lloyd Mostyn, the eldest son of the present Lord Mostyn, attained twenty-one,
* 394 and thereupon the entail in * devised estates was barred and the estates limited to the Honourable T. E. M. L. Mostyn in fee, subject to Lord Mostyn's life-interest, and, Lord Mostyn having mortgaged his life-interest with power of sale, and the Honourable T. E. M. L. Mostyn having purchased the life-interest from the mortgagee, the trustees of the Act conveyed the estates which had not been sold under it to the Hon. T. E. M. L. Mostyn in fee. A sale which had been agreed to be made by the trustees under the Act of Parliament of the Cors-y-gedol estate was afterwards completed by him, and he applied the moneys arising from this sale in discharge of a mortgage which he had made of the estate. He also made settlements and sales of other parts of the estates conveyed to him by the trustees of the Act, including the remaining part of the Cors-y-gedol estate, and that estate appeared to have been sold for sums amounting in the whole to 124,428*l.* 2*s.* 9*d.* The moneys arising from the sales of the estates which were sold under the Act, after paying off the mortgages upon those estates, were paid into Court according to the provisions of the Act, and were administered in a suit of *Mostyn* v. *Mostyn*, which was instituted in the Court of Chancery in the month of December, 1842, for the execution of the trusts of the Act. This suit was instituted by the present Lord Mostyn against the first Lord Mostyn, the trustees of the Act, and the eldest son of the present Lord Mostyn. In this suit the accounts were taken of the testator's estate and all his debts were paid, and by one of the reports in the suit, dated the 8th of July, 1846, the Master, as to the value of the Cors-y-gedol and Plas Hen estates, found as follows: "That at the time of the testator's death the annual net rental of the Plas Hen estate was 2890*l.* 11*s.* 1*d.*, and that of the Cors-y-gedol estate 2512*l.*
* 395 12*s.* 1*d.*; that the value of the term * of 500 years in those estates at the time of the testator's death was 137,329*l.*, from which being deducted the sum of 105,000*l.*, the amount of the mortgages on those estates, there remained the sum of 32,329*l.* as the value of the said term at the time of the testator's death."

Under the proceedings in the suit of *Mostyn* v. *Mostyn* the testator's personal estate and the moneys paid into Court under

the Act were exhausted in the payment of costs and of the testator's funeral and testamentary expenses and debts, leaving in Court a small balance only, quite insufficient to meet the costs remaining unpaid. Under directions given in that suit, a bill was also filed to recover the debt due from the estate of Richard Parry, and ultimately upon a compromise of this suit a sum amounting to upwards of 8000*l.* was paid by Parry's estate in discharge of the debt.

The first Lord Mostyn died in the year 1854, and there had not since his death been any personal representative of the testator. The Honourable T. E. M. L. Mostyn, the eldest son of the present Lord Mostyn, died after the institution of the present suit, having by his will devised his real estates, including the unsold parts of the estates conveyed to him by the trustees of the Act, to Lady Henrietta Augusta Mostyn, Reginald John Cust and the Honourable Ralph Pelham Nevill, and appointed them to be his executors.

The present Lord Mostyn, some time in the year 1849 or 1850, became embarrassed in his circumstances, and he had ever since been quite unable to answer the covenants on his part contained in the deed of the 20th March, 1843.

The bill in the present cause was filed in the year * 1859 * 396 by Charles Hyde Brooke, the only child of Captain and Mrs. Brooke, as being the person entitled under their marriage settlement to the capital of the legacy of 20,000*l.* It was filed against the present Lord Mostyn, the late Honourable T. E. M. L. Mostyn (against whose devisees in trust and executors it was revived) and the trustees of the settlement of 1840, and against other parties, whose interests need not be stated. The bill was filed during the infancy of the plaintiff, under the direction of the Court, in a suit for executing the trusts of the marriage settlement of 1840, and in addition to the facts above mentioned it alleged that the total amount of the testator's debts at his death, other than mortgage debts, was 132,090*l.* 10*s.* 2*d.*, in addition to the sum of 105,000*l.*, secured by two mortgages on the Plas Hen and Cors-y-gedol estates, and that the total amount of the debts of the testator, added to the total amount which eventually became payable in respect of legacies given by the will and bequeathed, was the aggregate sum of 287,090*l.* 10*s.* 2*d.*, and that the value of the personal estate of the testator at the time of his decease, and the value of the 500 years' term in the Plas Hen and Cors-y-gedol estates

amounted in the aggregate to a sum very far exceeding the sum of 287,090*l.* 10*s.* 2*d.* The bill further alleged that on the occasion of the application being made to the plaintiff's father to release the legacy of 20,000*l.*, Lord Mostyn asserted that the property charged by the testator with the payment of the legacy of 20,000*l.* would prove utterly inadequate to satisfy it, and that he further assured the plaintiff's father and mother that he was very anxious and desirous that the legacy should be properly secured, and further that when his eldest son came of age, which would be in 1851, the legacy would certainly be either paid off at once or be adequately secured by mortgage. The bill further alleged that the

* 397 * representations made by the present Lord Mostyn to the plaintiff's parents as to the insufficient value of the properties charged with the payment of the testator's debts and legacies were altogether erroneous, for that such properties were far more than sufficient to have paid the whole of such debts and legacies. The bill further stated that the plaintiff's father was wholly ignorant of the value of the testator's personal estate and of the 500 years' term, and relied entirely on the truth of Lord Mostyn's representations, and that, being anxious to afford any reasonable assistance to Lord Mostyn in winding up the testator's affairs, he, in reply to Lord Mostyn's application, stated that he could not himself give any answer to the application until he had consulted his solicitors, and that he would at once consult Messrs. Jones Bateman & Bennett, who had been the testator's solicitors, but that in reply Lord Mostyn stated that differences had arisen between himself and Messrs. Jones Bateman & Bennett, and that he should decline having any thing to do with them about the business, that he also urged the plaintiff's father to consult some other solicitor, and that the plaintiff's father accordingly, with the view of meeting the wishes of Lord Mostyn, and having at that time perfect confidence in him, gave instructions to Messrs. Whishaw, of Gray's Inn, to investigate the circumstances relative to the proposed arrangement, and to act for him and his wife and infant child with reference thereto. The bill further alleged that Messrs. Whishaw were wholly ignorant of the value of the estates comprised in the term, and had never previously been employed in any matters connected with the testator's estate or affairs; that Messrs. Jones Bateman & Bennett, on the contrary, as was well known to Lord Mostyn, were well acquainted with the testator's affairs and with the

value of the estates, and knew what was about the value of the personal * estate of the testator and what was the amount of * 398 his debts, and were in the year 1837 the solicitors of the first Lord Mostyn and of the present Lord Mostyn, and that it was while they were such solicitors that the legacy duty on the several legacies bequeathed by the testator was paid or secured to be paid to the commissioners of stamps and taxes. The bill then stated that the Messrs. Whishaw considered the proposal made by Lord Mostyn, and that, in order to enable them to advise upon the subject, they were furnished by Lord Mostyn with copies of the memorial to the Stamp Office and of the schedules thereto; that, acting entirely upon the information given to them by the memorial and schedules, and believing the same to be correct, they advised the plaintiff's father that he ought to accede to the arrangement proposed by Lord Mostyn, and approved of a draft deed of release purporting to release the estate of the testator from all claim in respect of the legacy of 20,000*l.* That Messrs. Whishaw, however, further advised the plaintiff's father that the interest of the plaintiff could not be released without the aid of the Court, but that if the facts were as stated by Lord Mostyn, and were sufficiently verified by proper evidence, the Court would probably sanction the arrangement and authorize the execution of proper deeds for releasing the testator's estate from the payment of the legacy of 20,000*l.*; that the advice thus given by Messrs. Whishaw was founded entirely on the statements contained in the memorial and schedules, and that the memorial and schedules were not accurate, but largely underrated the values of the properties comprised in the term. The bill further stated that various allegations were made to the Master by or on behalf of the present Lord Mostyn and his father in support of the propriety of acceding to the arrangement, and that amongst other things it was alleged by the present Lord * Mostyn that all the other legatees of the testator * 399 had, without any valuable consideration, released their legacies under the testator's will, which they would not have done had they not been well assured that the properties charged therewith were insufficient for the payment thereof, and it charged that these allegations were contrary to the facts. The bill stated that it was also alleged that if such proposed arrangement were not acceded to on behalf of the infant plaintiff, much litigation would be cer-

tain to ensue, and that the legacy of 20,000*l.* would be altogether lost to Mrs. Brooke and those claiming through her. The bill further stated that the plaintiff's father and mother had at the time of the inquiry the most perfect confidence in the present Lord Mostyn, and fully believed and relied upon all his representations, and accordingly did not oppose his proceedings before the Master.

The case made by the bill may be considered as summed up in paragraphs 62, 63, 64, which were as follows: —

"62. The plaintiff charges that the said report of the said Master, bearing date the 14th of March, 1843, was founded on misrepresentations made by or on behalf of the said defendant Edward Mostyn Lloyd, Lord Mostyn, of facts which were or ought to have been within his own knowledge, and further that such misrepresentations were acted on and that thereby great loss and damage have accrued to the plaintiff, and the plaintiff likewise charges that the said releases executed respectively by the said Edward Hyde Clarke and George Rochfort Clarke were founded upon the like misrepresentations made by the said defendant Edward Mostyn Lloyd, Lord Mostyn, and that, so far as affects the plaintiff, such releases ought not to be considered as valid and binding or of any effect."

* 400 * "63. The principal allegations made to the said Master by or on behalf of the said defendant Edward Mostyn Lloyd, Lord Mostyn, in favour of the proposed arrangement, and upon the consideration of which the Master made his report, were, first, that the value of the personal estate of the said testator and of the said term of 500 years in the said estates charged by the said testator with the payment of his debts and legacies was by a large amount insufficient for the payment of such debts and legacies; secondly, that all the other legatees under the said will of the said testator had, without any valuable consideration and after duly investigating all the circumstances of the case, released the property charged therewith by the said testator from the legacies given and bequeathed to them respectively, and that they had thereby admitted that the value of the said personal estate of the said testator, and of the said term of 500 years in the said estates comprised therein, was insufficient to pay and discharge such

debts and legacies, and that unless the said proposal of the said defendant Edward Mostyn Lloyd, Lord Mostyn, were acceded to the said legacy would wholly fail; thirdly, that it would be more to the advantage of the plaintiff to have the security of the covenant of the said defendant Edward Mostyn Lloyd, Lord Mostyn, which would bind his life-estate in the large hereditaments devised to him for his life by the said will of the said testator, rather than to retain the charge created by the said testator, upon property alleged to be by a large amount insufficient to satisfy the debts of the said testator."

"64. The plaintiff charges that all the said allegations made by or on behalf of the said defendant Edward Mostyn Lloyd, Lord Mostyn, to the said Master, and upon which the said Master mainly founded his said report, and upon the truth of which allegations the said * release was directed to be executed, * 401 were contrary to the fact, and that it was well known to the said defendant Edward Mostyn Lloyd, Lord Mostyn, at the time when he either by himself or by his solicitors and agents made such allegations to the said Master, that such allegations were contrary to the fact."

The bill further charged that the actual value of the personal estate of the testator, as admitted by the first Lord Mostyn and by the present Lord Mostyn, was 44,561*l.*; that the value of the term of 500 years was 350,000*l.* at the least, leaving a clear surplus of 109,469*l.* after paying the mortgages for 60,000*l.* and 45,000*l.* and after paying and satisfying all the testator's debts and legacies; that with reference to the representation made by or on behalf of the defendant Lord Mostyn to the Master, that the commissioners of stamps and taxes had consented to return the legacy duty paid or secured to be paid by the first Lord Mostyn, the statements made to the commissioners as to the value of the estates charged with debts and legacies were very incorrect; that when the defendant Lord Mostyn obtained (if he did ever obtain) from the commissioners a return of the legacy duty, he well knew that a part only of the Plas Hen estate had been sold for 57,000*l.*, more than he had stated the whole value of the estates charged with the debts and legacies to be, and that the remainder of the Plas Hen estate was worth about 10,000*l.*, and the value of the Cors-y-gedol estates exceeded 100,000*l.*, as he had since sworn,

so that he well knew that the estates were worth at least three times as much as in the memorial he misrepresented the value thereof to be.

The bill further charged that no sufficient or proper evidence as to the propriety of the proposed arrangement
* 402 * was ever carried in before the Master prior to his report of the 14th of March, 1843, and the only evidence upon which he proceeded was calculated to convey, and did in fact convey to him, a very erroneous view of the actual facts of the case, and especially of the real value of the properties charged with the debts and legacies.

And the bill prayed to have the compromise set aside and the legacy raised and paid.

Lord Mostyn by his answer stated that the legacy duty on the legacies was paid, and that payments on account of some of the legacies were made by him on the erroneous supposition that the real estates of the testator not comprised in the term were liable to the payment of the legacies, and that there were therefore sufficient assets to satisfy the same. He further stated that the idea of his giving a security for payment of the sum of 20,000*l.* originated in the first place, not from his desire to obtain a release of the legacy, but from his wish to benefit and secure a provision for Eliza Mostyn. He alleged that the legatees were represented by their respective solicitors, whom he named; that such solicitors investigated the state of the assets, and that after due investigation all the legatees released or waived their legacies, except Catherine Mostyn, who died unmarried on the 21st of August, 1841. He further stated that the legacy duty paid on the legacies was returned by the commissioners, and the security given for such of the duties as were not paid was cancelled in consequence of the memorials and on the commissioners being satisfied, as the facts were, that there were not sufficient assets for the payment of the legacies.

He further stated that the 105,568*l.*, the value of the estates comprised in the term as stated in the memorial,
* 403 * was calculated at a net rental of 5027*l.*, being the average for the six years prior to the date of the memorial at twenty-one years' purchase, and he set forth a statement made by Mr. Sisson, the local agent of the estates devised by the will at the

time when the releases of the legacies were in the course of negotiation, which statement was as follows: —

"I have perused that part of Mr. Harris's letter" (that is, the representative of Mr. Parry) "which requires information as to the rental of the Plas Hen and Cors-y-gedol estates and the value of the same if sold under the will of the late Sir Thomas Mostyn for the term of 500 years, and with reference thereto I beg, in the first instance, to refer you to the enclosed copy of my ten years' average of the receipts, outgoings, and net income of the above estates, which averages were made up and signed by me on the 2d of August last. From these it will appear that for that period the average net receipts from these estates amount to 5296*l.* annually. Since the year 1840, a similar expenditure in repairs, drainage, and planting has been continued with a view to enhance the value of the estates permanently, and in consequence of such extensive repairs and improvements of the two estates, they have been revalued, and the result of such revaluing and new letting, I believe, will be that the net income from the two estates will be increased 1015*l.* per annum. But the increased letting was effected previously to the new tariff and present state of the markets, and it is in some measure doubtful whether this increase of rental can be maintained. I will, however, present my valuation of the term of years if sold according to the old rental, the net amount of which I will take at the sum of 5887*l.* annually, which is more than the annual net receipt of ten years' average, because larger sums were expended than the ordinary repairs and outgoings * would have required. This income * 404 for the term of 500 years, from my own opinion, corroborated by the opinions of others accustomed to valuations on the contingencies and disadvantages attending such an estate, I estimate at twenty-two years' purchase, which would amount to 129,514*l.* I will also add, supposing that the increased rental can be maintained, the estimate for the purchase of the term would be 151,844*l.*; but from the present apprehensions respecting the agricultural interests, the realization of this latter sum cannot, with any certainty, be calculated upon.

"JOHN SISSON,
"*Agent of the estates.*"

"3d June, 1842."

The answer went on to state that the memorials to the commissioners stated the testator's debts due at his death other than mortgage debts at only 112,238*l.* 3*s.* 7*d.*, but that they were afterwards ascertained, in the suit of *Mostyn* v. *Mostyn* in Chancery, to amount to 132,090*l.* 10*s.* 2*d.*, and that they stated the mortgage debts charged on the estates comprised in the term at 105,000*l.*, and that upon the statements, taking the lowest estimate of value, there was a deficiency of upwards of 71,000*l.* for payment of the debts exclusive of legacies and testamentary and funeral expenses, and that taking the highest estimate, which was he believed under the circumstances far too high, there was a deficiency of 25,000*l.* and upwards, and that had there been any surplus for payment of legacies, but not sufficient to pay them in full, they would have had to abate *pari passu;* and he submitted that if it should be held that the release of the legacy of 20,000*l.* was for any reason invalid, the plaintiff ought not to stand in a better position than if the other legacies had not been released. He relied also
* 405 upon the recitals in the Act of Parliament, stating * that evidence was adduced in support of them before the House of Lords. He further stated, that when he made the proposal mentioned in the report of the 14th of March, 1843, all parties were satisfied, as the facts were, that there were not sufficient assets for payment of the legacy, and that when he made the proposal he believed, as he was then fully entitled to do, that his means were sufficient for the purpose, — that the Master was duly attended by the solicitors of all parties including the infant, and that all facts were properly brought before him and fully investigated by him, and he was satisfied that the proposal was for the benefit of the infant; and he stated, that the compromise was *bonâ fide* from beginning to end, and that there was no pretence whatever for alleging that there was any improper scheme or any fraud or misrepresentation or concealment or any undue pressure on his part or on the part of his solicitor or agents, that the arrangement was *bonâ fide* believed by all parties to be for the benefit of the infant, and that the grounds on which the order and indenture and deeds-poll were respectively made and executed were such as before stated, and that they truly and fully appeared in the statements and recitals in the order and indenture, and deeds-poll respectively contained, and that such recitals and statements were according to the facts, and that he made no statements or

representations substantially or materially differing therefrom, and that the trustees of the settlement were both particularly active in every thing relating to the compromise, and were both as he believed thoroughly satisfied of its expediency. He further stated that he was anxious at the time of the compromise that the legacy should be paid or secured for the benefit of the parties, and that he believed that the arrangement was under the circumstances the most beneficial course that could have been adopted, and at any rate it was *bonâ fide* intended so to be; if the suit of
* *Brooke* v. *Mostyn* had been prosecuted, the relief sought * 406
thereby would unquestionably have been opposed by every means, and he believed that the result would have been that the plaintiff would have got nothing. He further stated, that when the proposal was made he fully believed and had every reason to believe that he should be able to carry it into effect, and that he was satisfied that under the circumstances the proposal was for the benefit of the infant. He admitted that, by reason of circumstances which occurred subsequently, he had not the means of performing his covenant. He alleged, that at the time the sales took place by public auction the money market was very favourable, and there was a great demand for landed property, particularly in Wales, and by reason of such demand, and of the manner in which the Plas Hen estate was laid out for the sale, and from exceptional circumstances attending the sale of some of the lots, the prices obtained for the Plas Hen estate were exceedingly high, in fact far higher than had ever previously been obtained for property in Wales, the prices amounting on an average to nearly forty years' purchase on the rental for the fee, and were wholly unexpected and a surprise upon everybody; that moreover some of the lots which were convenient to be held with adjoining property were run up much beyond their real value, whilst the sales which were made subsequently to the auction of the lots not then sold did not fetch more than from twenty-five to twenty-eight years' purchase on the rental for the fee. After referring to the value of the term as found by the Master in the report of 1846 as being 32,329*l.* only, he stated that the value of the term at the testator's death as found by the Master was based upon the evidence mentioned in the report and was calculated upon an estimate of twenty-five years' purchase on the net rental taken at 5492*l.*, which exceeded the average net rental for the ten following years.

* 407 He * alleged that the Master was made aware of all the material facts and circumstances relating to the estate and the value thereof, and he denied having kept back from the Master any of the real facts of the case. He urged that the compromise had been acted on for fifteen years and upwards without any attempt being made to dispute it, and that the persons now interested in the estates sought to be affected by the plaintiff under him and his son were purchasers without notice, and that it was impossible to put them in the same position as if the legacy had not been released. By his answer to the amended bill, Lord Mostyn explained at length why he had objected to Messrs. Jones Bateman & Bennett being employed on behalf of the plaintiff's father and mother, and alleged further grounds for concluding that the matter had been fully investigated. He stated that the legacy duty on the several legacies was paid or secured to be paid to the commissioners of stamps and taxes in consequence of his solicitor having been erroneously advised that all the real estates devised by the testator's will were liable to the payment of his debts, legacies, and annuities. He further proceeded to give explanations as to the releases of the legacies and the payments which he made in respect of them, which he alleged to have been made on the footing of bounty and without acknowledgment of liability.

The answers of the other defendants were to the same effect, and the evidence on the part of the plaintiff did not carry the case much beyond what was admitted by the answers. It was proved on his part by his father that representations were made to the father that the testator's estates were insufficient, to a large amount, to pay the debts and legacies, that the father was himself ignorant of the value of them, and that his wife desired that Messrs.

* 408 Jones Bateman & Bennett should be consulted, * but that Lord Mostyn stated there were differences between him and them, and urged him to consult some other solicitor, and that he consulted Messrs. Whishaw accordingly. On cross-examination Captain Brooke stated that Mr. Cynric Lloyd urged him to accept Lord Mostyn's proposal on the same grounds as Lord Mostyn had urged upon him; that neither of the Messrs. Clarke did, to his knowledge, make any inquiries as to the value of the estates charged with the legacies; that Mr. Clarke advised him to accept the proposals of Lord Mostyn, and told him that in so advising

him he was acting under the advice of his brother, and that there was no risk; that about the time when the application was first made, his wife told him that she had told Mr. Cynric Lloyd that she would consult Messrs. Jones Bateman & Bennett on the subject; that they had been the solicitors of the testator, Sir Thomas Mostyn; that Mr. Cynric Lloyd, on the part of Lord Mostyn, objected to her doing so, and Captain Brooke believed that he assigned as a reason for not doing so that there had been differences between them and Lord Mostyn, and that it would be unpleasant to Lord Mostyn if they were consulted; that it was in consequence of that Messrs. Whishaw were employed in the business. Mr. Whishaw deposed that in the year 1840, he, with his brother, acted as solicitors for Captain Brooke as to his marriage settlement, and that in the course of the business he had several conferences and some correspondence with Mr. Bateman, who attended on the subject of the then proposed settlement, and in particular with reference to the legacy of 20,000*l.*, which it was alleged that Miss Mostyn was entitled to under the will of Sir Thomas Mostyn, which legacy it was proposed to include in the settlement; that in the course of the business Mr. Bateman said that the legacy was chargeable not only on the estates of Sir Thomas Mostyn which were comprised in the term of 500 years created * by his will for the purpose of raising money * 409 to discharge the testator's debts, funeral expenses, legacies, and annuities in aid of his residuary personal estate, but also on all the other devised estates of the testator, as he, Mr. Bateman, considered that the other real estates of the testator were liable to be marshalled; and that Mr. Bateman further stated, that if the estates comprised in the term of 500 years were properly managed they were worth 10,000*l.* a year, and 400,000*l.* to sell.

The evidence on the part of the defendants proved that the net annual receipts for rent in respect of the Plas Hen and Cors-y-gedol estates were, on the average for ten years from 1831 to 1840, after deducting all payments, in respect of the Plas Hen estate, 3211*l.* 0*s.* 5¾*d.*, and in respect of the Cors-y-gedol estate, 2103*l.* 13*s.* 7½*d.*

The solicitor who had the conduct of the sales made in the year 1844 deposed that, in the year 1844, he was employed by the trustees to put up the estates for sale; that at the time the sales took place by public auction the money market was, to the best of his recollection, very favourable for the sale of land at high prices, and

that there was a great demand for landed property in Wales, and that by reason of such demand, and in consequence of so much money having been expended in permanently improving the Plas Hen estate, and from exceptional circumstances attending the sale of some of the lots, the prices obtained for the Plas Hen estate were exceedingly high, and in fact higher than had ever previously been obtained for property in Wales, the prices amounting, on an average, to nearly forty years' purchase on the rental for the fee, and that the prices were wholly unexpected and quite a surprise to himself and everybody acquainted with the property, and that some of the lots of the Plas Hen estate were convenient

*410 *to be held with adjoining property, and were run up to a price much beyond their real value. He further stated, that the remainder of the 231 lots into which the Plas Hen estate was divided, which had not been sold by public auction, were subsequently to the auction, at different times, sold under his management, and that the price obtained for the remaining lots so subsequently sold was not more than from twenty-five to twenty-eight years' purchase on the rental of the fee. He further stated, that the Plas Hen estate was at the time of such sales let at rack-rents, amounting to the full annual value of the property; that, in addition to having been employed as solicitor, he had great experience in the management and selling of estates in Wales, and was in consequence well competent to form an opinion respecting the value of Welsh estates; and that, from an opinion he had formed upon the subject derived from his knowledge and experience of the sale of estates, if a term of 500 years in the Plas Hen estate had been put up for sale instead of the fee-simple thereof, the prices realized by such a sale would have fallen far short of the prices realized at the sales he had mentioned, inasmuch as a term of years would only have conferred a leasehold interest, and on account of the contingencies and disadvantages attendant upon such an interest, it was never in favour with purchasers; and that, in his opinion, the prices realized by a sale of such term would, at the most, have averaged from twenty-two to twenty-five years' purchase on the net rental of the estate, and no more. . This evidence was confirmed by that of another witness. And as to the value of the Cors-y-gedol estate, the auctioneer who was concerned in the sale deposed that he put that estate up in July, but that it was not then sold, and that it was again put up in November, 1858, and a

great part, namely, about one-half, was then sold in lots, and that the prices obtained at the last sale amounted to *sums *411 varying from twenty-five to thirty years' purchase on the net rental for the fee and no more; and that subsequently to the auction in 1858 various parts of the Cors-y-gedol estate were sold by private contract, and that the prices obtained for such parts of the estate amounted to sums varying from twenty-five to twenty-eight years' purchase on the net rental; and that in January the remainder of the Cors-y-gedol estate was sold by him, and that the prices then obtained by him varied from twenty-five to thirty years' purchase. All these witnesses deposed as to the value of the term to the same effect as the solicitor conducting the sale. It was also proved, on the part of the defendants, that before the release was executed by M. B. Mostyn, and before the payment was made by Parry's executors, very careful inquiry was made on behalf of both these parties as to whether there were or were not sufficient assets for the payment of the legacies.

Upon the hearing of the cause before the Master of the Rolls, his Honor dismissed the bill with costs as against the trustees of the Act of Parliament and the trustees of the settlement, and without costs as against the remaining defendants. The plaintiff appealed from the whole decree.

Mr. Selwyn, *Mr. Freeling*, and *Mr. Cutler*, for the appellant.—We allege that the compromise, which was sanctioned by the Court on behalf of the plaintiff during his infancy, was obtained by misrepresentation. It is clear upon the evidence, especially Sisson's report, that the valuation of the estates proceeded upon erroneous *data;* that the rental was made to appear less than it really was by improper deductions, and that various circumstances which would have tended to increase the valuation, and *which must have been within the knowledge of the owner, *412 were not brought before the Master. Now, the question whether the estates were sufficient to meet the legacies was the material question as to the expediency of the compromise, and the non-communication of those circumstances is fatal to the validity of the compromise. The deed of covenant contains a recital that the estates were insufficient for payment of the legacies. This recital is shown to be untrue, and it is a representation by the owner of the estates, the falsehood of which vitiates the whole

transaction. *Bridges* v. *Branfill*, (*a*) *Rawlins* v. *Wickham*, (*b*) *Scholefield* v. *Templer*, (*c*) Story Eq. Jurisp. (*d*)

Mr. Dickinson, for Lloyd.

Mr. Baggally and *Mr. Jones Bateman*, for the present Lord Mostyn. — Lord Mostyn has performed his engagement as long as he could, his circumstances now make it impossible for him to perform it further, and he comes before the Court free from moral blame. The case made by the bill is based on false and fraudulent representations alleged to have been made by him. If that case fails, the Court will give the plaintiff no relief, even if a case of innocent misrepresentation or failure to communicate all that ought to have been communicated should be established. *Wilde* v. *Gibson*. (*e*) There is not the slightest pretence for the allegations of fraud. The present Lord Mostyn derived no benefit from the compromise, he was only tenant for life, and was therefore answerable for nothing but the interest; by the compromise
*413 *he made himself liable for the capital. Everybody believed that the estate could not answer the charges, and this securing the capital was an act of generosity. The plaintiff's advisers, who acted also for his father and mother, had every opportunity of ascertaining the true state of facts. The evidence does not support the contention that the recital of the insufficiency of the property to pay the legacies was incorrect at the time, and the case must be decided according to the facts as they stood then. The Court had power to sanction the compromise on behalf of the infant, and will not allow him to disturb it. *Morison* v. *Morison*, (*g*) *Gregory* v. *Molesworth*, (*h*) *Earl of Buckinghamshire* v. *Drury*. (*i*) The plaintiff ought in any event to have no costs, as he alleges fraud which he fails to prove. *Wright* v. *Howard*. (*k*)

Sir H. M. Cairns and *Mr. Speed*, for the present owners of the estates. — There is no doubt as to the jurisdiction of the Court to sanction a compromise on behalf of an infant. *Bennett* v. *Merri-*

(*a*) 12 Sim. 369.
(*b*) 3 De G. & J. 304.
(*c*) Johns. 155; 4 De G. & J. 429.
(*d*) Par. 193.
(*e*) 1 H. L. Cas. 605.
(*g*) 4 M. & C. 215, 224.
(*h*) 3 Atk. 626.
(*i*) 2 Ed. 60.
(*k*) 1 S. & S. 190, 206.

man, (*a*) *Drake* v. *Fortune*, (*b*) *Taylor* v. *Phillips*, (*c*) *Chetwynd* v. *Fleetwood*, (*d*) *Ashburton* v. *Ashburton*. (*e*) Here the compromise was sanctioned by the Court on behalf of the plaintiff, and there being no fraud, an original bill is not the proper mode of setting it aside, there ought to be a bill of review. But as between parties *sui juris* there is no sufficient ground in the present case for holding the compromise invalid. There was no misrepresentation of any fact; the value was matter of opinion. Story Eq. Jurisp., (*g*) *Clapham* * v. *Shilleto*. (*h*) We claim pro- *414
tection as being purchasers for value without notice. *Greenwood* v. *Churchill*, (*i*) *Joyce* v. *De Moleyns*. (*k*)

Mr. Southgate, for the trustees under the Estate Act.

Mr. De Gex, for other parties.

Mr. Selwyn, in reply. — The bill is not based on fraud in the sense in which the respondents contend. Our claim is against the estate, not against Lord Mostyn, the case made being that the estate has not been duly released from our equitable charge. We do not allege any fraud against the parties interested in the estate, but we say that another party has by fraud procured a release, and we do not allege moral fraud against him, but only that conduct which, in technical language, is said in the view of a Court of Equity to amount to fraud. The defence of purchase for value without notice cannot avail, for there was notice. The statement before the Master as to the legatees having released their legacies was in substance untrue; the value of the estates was not fairly represented, and there was no evidence before the Master as to the solvency of Lord Mostyn. There was no rental produced before the Master, — nothing but a statement that the estates had been valued by competent persons, whereas the valuation that had been made was on quite an erroneous principle. A compromise entered into under such circumstances cannot stand.

Judgment reserved.

(*a*) 6 Beav. 360.
(*b*) 1 Moll. 201.
(*c*) 2 Ves. Sen. 23.
(*d*) 1 Bro. P. C. 300.
(*e*) 6 Ves. 6.
(*g*) Sect. 191–197.
(*h*) 7 Beav. 146.
(*i*) 6 Beav. 314.
(*k*) 2 Jo. & Lat. 374.

November 21.

* 415 * The Lord Justice TURNER, after stating the facts of the case in nearly the same terms as above, but somewhat more fully, proceeded as follows: —

I have entered thus at length into the facts of this case, because in the course of the argument before us all these facts were relied on upon the one side or the other, and because the question raised by this appeal appears to me to be one of no little importance. The object of this suit is to undo a compromise made under the order of this Court. That this Court has power to compromise the rights and claims of infants and persons under disabilities, where those rights and claims are merely equitable, has not been and cannot be disputed. It is a power which has been continually exercised by the Court, and results almost necessarily from the jurisdiction which the Court exercises over trustees. In the exercise of that jurisdiction the Court may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of *cestuis que trust* who are infants or under disabilities;[1] and to say that *cestuis que trust* can, except under very special circumstances, undo what the Court has ordered to be done, would be to cut away the root of the jurisdiction. I have thought it right to make these observations, because I consider it of great importance that no doubt should be cast upon this power of the Court, or upon the validity of acts done in the fair and *bonâ fide* exercise of it. The rights of infants and incapacitated persons must in many cases be sacrificed if the power be not maintained, and acts which have been done under it cannot be disturbed, without property to a great amount being affected by the disturbance. These considerations are of themselves sufficient to show that it is not upon any light grounds that such a compromise as is impeached by this bill ought to be disturbed, but

* 416 * there is a further consideration which leads to the same conclusion. Such compromises as these are made by the Court in the exercise of its discretion, and it is not the habit of the Court to disturb what has been done by the Court in the exercise of discretion, except upon very strong grounds.

It is to be considered, then, what are the circumstances which will furnish sufficient ground for impeaching a compromise made

[1] See 1 Dan. Ch. Pr. (4th Am. ed.) 66, 67.

under the order of the Court, and I think they must be such as to amount to fraud in the party claiming the benefit of the compromise, meaning by fraud not moral fraud, but what in the eye of this Court is considered as amounting to fraud. A compromise of doubtful rights between adult parties cannot, as I conceive, be set aside on any other ground. If there be no fraud, and equal knowledge on both sides, the compromise cannot be disturbed, but if there is knowledge on one side which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts in the view of a Court of Equity to fraud. The rule which applies between adults seems to me to be not less applicable to compromises by the Court on behalf of infants. The orders of the Court cannot be set aside on grounds less strong than those which would be required to set aside the transaction between competent parties. Whether the grounds which would be sufficient to set aside a compromise between competent parties would in all cases be sufficient to set it aside when sanctioned by this Court, I do not think it necessary for us in this case to determine. There is not, as I apprehend, any doubt that a decree or order may be impeached for fraud by original bill, and I pass by therefore the argument which was urged at the bar as to a bill of review being necessary to set aside the order, and the consequences which would follow upon that * argument. It * 417 is sufficient to say, that in my opinion the plaintiff, in order to entitle himself to relief in this suit, must make out a case of fraud,[1] and that this bill, therefore, is properly founded, and the case was properly rested at the bar upon that ground. This is the principle which, in my judgment, ought to be applied to the determination of this case, and it is upon this principle I rest my judgment upon it.

Much was said in the course of the argument before us with reference to the representations which were made to the commissioners of stamps and taxes for the purpose of procuring the return of the legacy duty, and it was strongly urged on the part of the plaintiff that those representations were untrue, or, to say the least, were dishonest and unfair; much was also said as to the desire expressed by the first Lord Mostyn, that Messrs. Jones Bateman & Bennett should not be consulted on the compromise, and much more was said as to the amounts ultimately produced

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1584.

by the realization of the Cors-y-gedol and Plas Hen estates, but these are matters which, so far as they have any bearing upon the question we have to decide, have in my opinion no more than an indirect, and, for the most part, a remote bearing upon it. The question which the commissioners of stamps and taxes had to consider was, whether there had been assets of the testator for the payment of the legacies, and the memorials do not seem to me to go further than to state that there had been no payment to the legatees out of the estate, and no acknowledgment of any liability on the part of the estate to make such payment. It cannot, I think, be considered to have been a fraud upon the commissioners not to have communicated the fact, that payments had been made to the legatees by the present Lord Mostyn otherwise than on account of the estate; but even assuming that there was a
* 418 deception practised on the * commissioners, it would, I think, be going too far to hold that the compromise with the plaintiff could be affected by that deception. The non-employment of Messrs. Jones Bateman & Bennett is, I think, sufficiently accounted for, and I do not think that the circumstance of the Cors-y-gedol and Plas Hen estates having been ultimately sold for sums so far exceeding their estimated value has any further bearing upon the case than as it casts a suspicion upon the *bona fides* of the estimate which had been made of them, and renders it incumbent upon the Court very carefully to examine the grounds of that estimate. If the compromise was fairly and honestly entered into at the time, its validity cannot, as I conceive, be affected by what subsequently occurred. The true question in this very complicated case seems to me to be, was this compromise fairly and honestly made at the time? If it was, the plaintiff must be bound by it. If it was not, he must be entitled to be relieved against it, and to have it ascertained, by proper accounts and inquiries, whether there are or are not assets for the payment of the legacy in which he is interested. There is nothing which I can see to debar him from such accounts and inquiries, if he is not bound by the compromise; for assuming that in the suit in which the accounts were taken the trustees could properly represent their *cestuis que trust*, he had ceased to be a *cestui que trust* before any material proceedings were taken in that suit.

The question whether this compromise was fairly and honestly made at the time depends, as it seems to me, upon the facts as

they were laid before the Master, and through the Master before the Court, upon whether all that was material to be stated and was within the knowledge of the parties was fairly and honestly stated, for I desire distinctly to be understood as not intending to * proceed on any error in judgment, either on * 419 the part of the Master or on the part of the Court. The bill impeaches the compromise on the grounds that representations which were untrue, or, at least, were unfair and dishonest, were made to the persons acting on behalf of the plaintiff and to the Court itself as to the value of the property liable to the payment of the debts and legacies, and as to the releases given by the other legatees. To the representations which were made as to the releases, although, no doubt, it would have been better that the real facts as to this part of the case should have been stated, I attach but little importance, for the considerations given for the releases of the other legacies were in effect the same as the consideration given for the release of the legacy in which the plaintiff is interested. The case, in my opinion, depends substantially upon the representations which were made as to the value of the property liable to the payment of the debts and legacies. It was not contended at the bar that the real estate not comprised in the term was liable to the payment of the legacies, or that the legatees were entitled to marshal the assets, so as to throw the debts upon those estates, and, looking to the frame of this will and to the authorities upon the point, it does not seem to me that this point could have been urged with any prospect of success.

The case therefore is reduced to this, were the representations made to the persons acting on behalf of the infant or to the Court as to the value of the personal estate and of the estates comprised in the term untrue, unfair, or dishonest? That representations were made that these properties were insufficient for the payment of the debts and legacies and even of the debts alone, admits, I think, of no doubt, and the question then is, were these representations true or untrue, fair or unfair, honest or dishonest? This question, it is to be observed, * is to be determined * 420 according to the facts as they stood at the time when the representations were made, and not according to the facts as they were ultimately found to be. That the estates were ultimately sold for sums far beyond the amounts at which they were valued at the times when the representations were made, has not, I think,

any further bearing upon the case than as it tends to show that they were undervalued at those times, and its bearing in this respect is in some degree affected by the evidence as to the state of circumstances which existed at the times when the sales were made. The value of land does not indeed fluctuate like the value of mines and property of that description, but there can be no doubt that land may be sold to greater advantage at one time than at another, and the evidence proves that the sales in 1844 were at prices far beyond what had been or could be expected, and that, at subsequent periods, other parts of the same estates were sold at much lower prices, at prices, indeed, less by ten years' purchase on the annual rental, but, with all this, there can be no doubt that the prices at which these estates were sold cast a doubt upon the fairness of the price at which they were valued. It is incumbent upon us, therefore, very carefully to examine into the details of the case, and into the representations on which this compromise was founded. The sole evidence before the Master appears to have consisted of the affidavits of Lord Mostyn and Cynric Lloyd, and of the Act of Parliament. So far as the value of the personal estate is concerned there is nothing, so far as I can see, upon the affidavits which can be sufficient to cast any doubt upon the compromise. The amount and value of that part of the estate appears to be fairly stated. The case must depend therefore upon the representations as to the value of the estates comprised in the term. It has been contended on the part of the plaintiff that, in estimating the assets for the payment of
* 421 the legacies, the value of * the fee of these estates, and not of the 500 years' term only, ought to be taken into account, but in my opinion this is not the true construction of the Act. The Act, no doubt, subjected the fee of these estates to the payment of the legacies, but I think it so subjected them only to the extent of the value of the term. It was not, as it seems to me, the purpose of the Act to extend or alter the rights of the legatees. By the Act the proceeds of the sales are to be applied to the payment of the debts and legacies, only so far as according to the true construction of the will they ought to be paid, and the proceeds are to be distributed under the order of the Court, and the Court must, of course, be governed by the provisions of the will in the absence of any contrary direction. It is to the value of the term therefore, and not of the fee, attention

must be directed. Now, upon the affidavits before the Master upon the reference as to the compromise, nothing more appears as to the value of the term than that it had been estimated by competent persons to be of the value of 151,000*l.* at the highest, and that this to the belief of Cynric Lloyd was the utmost value, Lord Mostyn being silent as to his belief upon the subject. How the case might have stood if it had rested here, it is not necessary for us to say, but there are further materials before us. The defendants have set forth the valuation of Sisson, which there can be no doubt is the valuation to which the affidavits referred. This is a document of the utmost importance. It appears from it that Sisson had before made a ten years' average of the receipts, outgoings, and net income of these estates, and that the average net annual receipts from these estates for that period amounted to 5296*l.* The document then states, that since the year 1840 a similar expenditure in repairs, draining, and planting had been continued with a view to enhance the value of the estates permanently, and that * in consequence of such extensive * 422 repairs and improvements the estates had been revalued, and the result was believed to be that the net income would be increased 1015*l.* per annum, and then, after suggesting some doubt whether this increase of rental could be maintained, the document proceeds thus: [His Lordship read the concluding part of Mr. Sisson's statement, which is given above, p. 403.]

From this document, then, it appears, that the 151,000*l.* was arrived at thus, — by first taking the net rental after deducting not merely for ordinary repairs, but for improvements also, and then adding to the net rental about 600*l.* a year for sums beyond ordinary repairs and outgoings, and taking twenty-two years' purchase on the aggregate sum. Now, this document must have been in the possession of the defendants when the case was before the Master; why was it not produced before him? How can we say, that if it had been produced before him, he would have acted upon this valuation? that he would not have been led to inquire whether there were not other parts of these estates which were valuable for sale, though producing no rental, and to inquire also whether the addition which was made to the rental in respect of the expenditure upon improvements was a fair and proper addition? What the result of such an inquiry might have been the evidence before us shows. It is in proof

that there are mansion-houses, with large quantities of land attached to them, which do not appear to have been let, and it is also in proof that the expenditure upon these estates was enormous, —never less than one-fourth, and in some years exceeding one-third of the gross annual rental; but I pass this by. It is sufficient to say that, in my opinion, this document shows that the materials necessary to enable a fair judgment to be formed upon the question whether this compromise was for the
* 423 * benefit of the infant were not fairly and properly brought under the Master's consideration, — that there was a suppression of material facts which were within the knowledge of Lord Mostyn and his advisers, and were not within the knowledge of the plaintiff or of those who acted for him. It may be said, perhaps, that the Master was satisfied with the information laid before him and called for no further information, but the question is not whether the Master called for further information, but whether the parties having this further information in their possession were justified in withholding it. I am satisfied that information was withheld which was material to have been given, and which, if given, might have altered the conclusion arrived at, and I think the fact of such information having been withheld amounts, in the eye of this Court, to fraud. I think that the advisers of the Mostyn family, perhaps from an over-zeal to carry out the object which it was intended to effect, laid before the Master such materials only as were calculated to lead him to the conclusion they desired, and kept back from him the further materials which would have led him to further inquiry. It was relied on upon the part of the defendants that the Act of Parliament was before the Master, but it is scarcely possible to suppose that the Master could have acted upon it, for as the Act subjects large estates to the debts which were not subject to them by the will, it was manifestly for the benefit of the creditors, whether the estates subjected by the will were sufficient or not, and as to the devisees, the question of the value of the estates was immaterial, the estates made liable by the Act being charged only to the extent to which the estates charged by the will were liable. It is said, I observe, in one of the answers, that evidence was given before the House of Lords in support of the bill on which the Act is founded, but no
* 424 such evidence was produced before the * Master, and none such is produced in the cause. If any such evidence was

given, why was it not produced before the Master? Here again is a circumstance tending strongly to show that all the material facts were not brought before the Court. And under all the circumstances of the case, but more especially having regard to the non-production of Sisson's valuation, my opinion is that this compromise cannot stand, and that the decree therefore cannot be supported. Little, if any thing, was said at the bar as to the decree which ought to be made in the event of the compromise not being upheld, and having regard to the state of the record, there seems to me to be a good deal of difficulty on this point. The best course, I think, will be that the cause should be put in the paper for consideration as to the decree to be made.

THE LORD JUSTICE KNIGHT BRUCE. — In this case it is plain, I think, that the report of 1843 in favour of the arrangement in question, called a compromise, though made by a very able Master, was founded on insufficient materials, and should not on the evidence before him have been made. And by the evidence in the present cause I am satisfied that if the evidence that might and ought to have been laid before the learned Master had been laid before him, it would have been right for him to report, and he in all probability would have reported otherwise than he did, that is to say, I am persuaded that he would have reported and properly reported against the arrangement called a compromise, which, in my opinion, the evidence before us clearly shows to have been unduly unfavourable to the interests of the present plaintiff, then an infant, unduly prejudicial to those interests and very far from reasonable. I think it also plain that there were before the Master on the occasion of the * reference, persons whose * 425 duty to the Court and to the infant it was to bring under the attention of the Master every material fact within their knowledge, but who omitted to lay before him material facts within their knowledge; and I state my conviction to be that the report was not properly, was not fairly obtained, and that the present plaintiff is on that ground entitled in this suit to be relieved against it, although it was confirmed and has been acted on, and to be relieved against the deeds of March, 1843, executed in consequence or as upon the footing of it. They were executed during his infancy, which, indeed, did not terminate before the year 1860, if so soon.

I consider that we ought to make a decree, setting aside the arrangement called a compromise, and containing such directions on that footing as justice may require. The manner of framing the decree will require great attention.

In what I have said I have assumed that the order of reference of 1843 and the order confirming the report under it were not made without jurisdiction, and were in conformity with the course and practice of the Court, but I have not meant to express any opinion upon that point, or any opinion whether the plaintiff is likely or not likely to derive considerable benefit from the decree now made, if not successfully appealed from.

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* 426 * In the Matters of JOHN BOURKE, B. G. BOURKE, and G. BOURKE, Persons of unsound mind; and

In the Matter of The TRUSTEE ACT, 1850.

1864. November 25. Before the LORDS JUSTICES.

Where the next of kin of a lunatic are unknown, a petition in lunacy ought to be served, not on the solicitor to the treasury, but on the Attorney-General.

A sum of stock was standing in the names of G. and H. as trustees for a lunatic. G. died in 1864, and E. was his executor. H. had died long previously, but no such proof of his death as the bank would act upon could be furnished. An order was made under § 22 of the Trustee Act, 1850, appointing the officer of the bank to concur with E. in transferring the stock into Court: *Held*, that such order could not be made on the petition of the committee alone.

JOHN BOURKE, Barnaby G. Bourke, and Georgiana Bourke, the three children of John Bourke and Georgiana Reeve Bourke (both deceased), having been found by inquisition to be of unsound mind, the Master in Lunacy, by a report dated the 18th of November, 1864, approved of John East to be committee of the estates of the three lunatics and committee of the persons of John and B. G. Bourke, and approving of John East and Mary his wife to be committees of the person of Georgiana Bourke. The report also stated the particulars of the fortunes of the lunatics, and proposed a scheme for their maintenance.

As regards the fortunes of the lunatics, it is only necessary to

state that each was entitled to one-third of a sum of 10,467*l.* bank annuities standing in the joint names of Georgiana Reeve Bourke and F. G. Hanrott. John Bourke was also entitled to a sum of 3333*l.* 6*s.* 8*d.* standing in the joint names of himself and Georgiana Reeve Bourke and F. G. Hanrott.

There was evidence strongly tending to show that Hanrott had died on the 25th of April, 1847; but no such evidence of his death as the Bank of England would act upon could be procured. Georgiana Reeve Bourke died in May, 1864, and the above-named John East was her executor. He therefore would have been capable of dealing with the 10,467*l.* bank annuities if * such evidence of the death of Hanrott as would satisfy * 427 the bank could have been procured.

The lunatics were next of kin to each other, and none of them had ever been married. John Bourke was the presumptive heir of the other two, but it was unknown who would be the next of kin or heir-at-law of the survivor of the three.

John East and Mary his wife now presented a petition, praying for the confirmation of the Master's report, and that John East might be appointed to transfer the sums of stock into the name of the accountant-general.

The next of kin being unknown, the petition was served on the solicitor to the treasury.

Mr. T. Hughes, for the petitioners.

Their Lordships held, that on the terms of the Trustee Act, 1850, § 37, Mr. and Mrs. East were not persons upon whose petition an order under that Act for transfer of the stock could be made. Their Lordships accordingly directed the petition to be amended by making the lunatics, by their next friend, co-petitioners.

Mr. Wickens, for the solicitor to the treasury, submitted that the petition ought to have been served on the Attorney-General, and not on the solicitor to the treasury.

Their Lordships held that the service was improper; but on *Mr. Wickens* undertaking to appear for the Attorney-General the case proceeded.

The question then arose how an order could be made as
* 428 to the 10,467*l.* stock, and it was suggested that it * might be made on the footing that it was uncertain whether Hanrott was living or dead.

Their Lordships made an order under sect. 22 of the Trustee Act, directing the officer of the bank to concur with East in transferring both sums of stock.

In the Matter of GREGSON'S ESTATE; and In the Matter of The LIVERPOOL IMPROVEMENT ACT; and In the Matter of The LANDS CLAUSES CONSOLIDATION ACT, 1845.

1864. November 4, 23. Before the Lords Justices.

A testator gave real estate to his wife for life, and directed that after her death it should be divided, share and share alike, amongst twelve persons mentioned by name, "or the survivors of them." All those persons survived the testator, but some of them died before the widow: *Held*, that the rule laid down in *Cripps* v. *Wolcott*, 4 Mad. 11, applies to real as well as personal estate, and that the estate belonged to such of the twelve persons as survived the tenant for life.[1]

This was an appeal from an order made by Vice-Chancellor Wood, turning upon the construction of the will of James Gregson the younger made in 1832. The will was as follows: —

"I the undersigned James Gregson, junior, do hereby bequeath unto my wife Margaret Gregson all moneys, debts, furniture, plate, &c., that I may die possessed of for her own sole use and benefit. I also bequeath unto my said wife Margaret Gregson the whole of my freehold property in St. Thomas's Buildings and in St. Thomas's Court, and also the whole of my freehold property situate in Combermere Street, Toxteth Park. And I hereby authorize her to have the benefit of all the rents arising from the above property situated in St. Thomas's Buildings and in St.

[1] See Neathway v. Reed, 3 De G., M. & G. 18, and note (1), and cases cited; Hill v. Rockingham Bank, 45 N. H. 270; Marriott v. Abell, L. R. 7 Eq. 478.

Thomas's Court in the borough of Liverpool, and in Combermere Street, in the township of Toxteth Park, after paying the interest * on the mortgages on the said properties, so long * 429 as she doth live; and on my wife Margaret Gregson's decease my will is that the whole of the above freehold properties situated as aforesaid shall be shared, share and share alike, amongst the following persons, or the survivors of them, viz. Edward Williamson, Jane Williamson, and Betsey Williamson, of Kirkham-in-the-Fylde, also my nephews and nieces Alice Garlic, James Garlic, Daniel Garlic, John Garlic, and George Garlic, also Cort and Cort, also my sisters Flavilla Gregson and Alice Gorton. And I further authorize my wife Margaret Gregson to sell my freehold property situated in Combermere Street, Toxteth Park, should she find that it would be advantageous to the estate, and the proceeds, after paying the mortgage, to be appropriated to the sole use and benefit of my freehold property situated in St. Thomas's Buildings, St. Thomas's Court, in the borough of Liverpool. And I hereby appoint my said wife Margaret Gregson my sole executrix to this my last will and testament."

The testator died soon after the date of his will. He was survived by all the twelve persons to whom, or the survivors of whom, his real estates were devised after the death of his widow, but six of those persons afterwards died in the lifetime of the widow.

In the year 1858, in the lifetime of the widow, a part of the estates devised by the will was taken by the corporation of Liverpool under the powers of the Liverpool Improvement Act, in which the Lands Clauses Consolidation Act was incorporated, and in pursuance of the provisions of that Act the purchase-moneys were paid into Court and invested in consols, and the dividends of the fund were ordered to be paid to the second husband of the widow during her life.

* The widow died on the 29th of October, 1863, and a * 430 petition having been presented soon after her death for the distribution of the fund, Vice-Chancellor WOOD, by the order made upon this petition, declared that, according to the true construction of the testator's will and in the events which had happened, the devised estates vested at the death of the testator, subject to the life-interest therein of the widow, in the twelve

persons named in the will in equal shares as tenants in common, and ordered the fund to be distributed accordingly, and he also ordered the costs to be paid by the corporation of Liverpool.

Several of the persons named in the will who survived the widow, the tenant for life, appealed from this order, contending that the fund was divisible among such only of the twelve devisees as survived the tenant for life.

Mr. Rolt and *Mr. E. R. Turner*, for the appellants. — The Vice-Chancellor in this case admitted that, as regards personalty, the rule is settled that a clause of survivorship such as this refers to the death of the tenant for life, as, after a long conflict of authority, was decided in *Cripps* v. *Wolcott*. (*a*) It would be most inconvenient to have a different rule with respect to real estate, as was observed by Vice-Chancellor WIGRAM in *Buckle* v. *Fawcett*. (*b*) *Doe* v. *Prigg* (*c*) is against us, but that case has been unfavourably observed upon in *Taylor* v. *Beverley* (*d*) and *Wordsworth* v. *Wood*. (*e*) The rule in *Cripps* v. *Wolcott* rests on this clear and solid ground, that a testator is presumed to
* 431 consider that his * legatees will survive him, and that therefore words relating to their death will not be confined to death in his lifetime, unless there is a context which shows that such was his intention. The Vice-Chancellor thought that there was a substantial ground for making a difference between real and personal estate, because in real estate the Courts favour early vesting, on account of the liability of contingent remainders to be destroyed, and he referred to *Boraston's Case*, (*g*) but that case only decides that an adverb of time was not to be construed as a condition precedent to the vesting, but merely as showing when the limitation was to take effect. This is the view taken of the case by Mr. Jarman. (*h*) The Vice-Chancellor relied on *Wilson* v. *Bayley*, (*i*) as establishing a distinction between realty and personalty with respect to limitations to survivors. But the subject-matter of that suit was partly real estate, partly personal, and no distinction is taken between them. The case clearly would not now be followed as regards personalty, and why should it be

(*a*) 4 Mad. 11.
(*b*) 4 Hare, 536, 542.
(*c*) 8 B. & C. 231.
(*d*) 1 Coll. 108.
(*e*) 1 H. L. Cas. 129.
(*g*) 3 Co. Rep. 19 *a*.
(*h*) 1 Jarm. Wills, 791, 3d ed.
(*i*) 3 Bro. P. C. 195.

followed as to realty, on the ground of a distinction which the case itself repudiates? His Honor also referred to *Goodtitle* v. *Whitby*, (*a*) *Bromfield* v. *Crowder*, (*b*) and *Doe* v. *Moore*. (*c*) They contain *dicta* tending to show that survivorship ought to be referred to the death of the testator; but the decisions do not touch the point. The two former relate to a *quasi* conditional limitation, and the third proceeds on the same ground as *Boraston's Case*. (*d*) *Rose* v. *Hill* (*e*) was relied on against us in the Court below, but all that was necessary to the decision of that case was to hold that there was no survivorship after the death of the * widow, a proposition which we do not * 432 dispute; and the wider doctrine laid down by Lord MANSFIELD was extra-judicial. *Stones* v. *Heurtley* there referred to and since reported (*g*) does not bear upon the question. In *Garland* v. *Thomas* (*h*) all the takers had survived the tenant for life, so that the only decision was that there could be no survivorship after her death. In *Edwards* v. *Symons* (*i*) the preceding life-estate was not created by the testator, so that it was an immediate devise of a reversion, and under a devise of all a testator's real estate, of course, the parts which are reversionary and those which are in possession go to the same takers. Moreover, there was a gift of maintenance, on which the Court laid stress. These are all the cases bearing on real estate which are earlier in date than *Cripps* v. *Wolcott*, except the two cases of *Doe* v. *Sparrow* (*k*) and *Clayton* v. *Lowe*, (*l*) which are referred to in *Doe* v. *Prigg*, (*m*) and in each of those cases the context clearly showed that death in the testator's lifetime was intended, and they furnish no support to the decision in *Doe* v. *Prigg*, which disregards *Cripps* v. *Wolcott* and all the cases on which it was founded. *Littlejohns* v. *Household* (*n*) is opposed to *Doe* v. *Prigg*. Suppose both realty and personalty given together, how is the word "survivors" to be construed? The Vice-Chancellor intimated that it would be referred to the death of the testator as to the realty and to the death of the tenant for life as to the personalty, thus making the

(*a*) 1 Burr. 228.
(*b*) 1 Bos. & P., N. S. 313.
(*c*) 14 East, 601.
(*d*) 3 Co. Rep. 19 *a*.
(*e*) 3 Burr. 1881.
(*g*) 1 Ves. Sen. 165.
(*h*) 1 Bos. & P. N. R. 82.
(*i*) 6 Taunt. 213.
(*k*) 13 East, 529.
(*l*) 5 B. & Ald. 636.
(*m*) 8 B. & C. 231.
(*n*) 21 Beav. 29.

two kinds of property go different ways, and he referred to *Forth* v. *Chapman* (*a*) as a case where the same words turned the
*433 two kinds of property into two different * channels, being held to refer to one event as to realty and to another as to personalty; but the Court will be opposed to such a construction, as most unlikely to be conformable to the testator's real intention. The case of *The Commissioners of Charitable Donations* v. *Cotter* (*b*) is somewhat in favour of *Doe* v. *Prigg*, but this case was decided before the decision in *Wordsworth* v. *Wood*, (*c*) and before the doctrine of *Cripps* v. *Wolcott* had been fully established as to personalty. The Vice-Chancellor thought that titles had been accepted on the faith of *Cripps* v. *Wolcott* not applying to personalty, but the law has been in such a state of uncertainty on this point that no one would think of accepting a title on that footing. (*d*) In *Young* v. *Robertson*, (*e*) where the gift comprised real and personal estate, the House of Lords held that the words of survivorship as to the whole must be referred to the death of the tenant for life.

Mr. Kay (*Sir H. M. Cairns*, with him), for the representatives of those devisees who died in the lifetime of the tenant for life.— In the case of real estate it is inconvenient that the shares should remain contingent, so that they cannot be dealt with during the life of the tenant for life, and so that, apart from the recent alterations in the law, they would remain liable to be destroyed as contingent remainders. As regards the cases cited against us, the words in *Wordsworth* v. *Wood* (*c*) were "my then surviving children," so that the case was hardly open to serious argument, and
*434 Lord CAMPBELL appears to doubt *Cripps* v. * *Wolcott*. In *Littlejohns* v. *Household* (*g*) there was an express reference to the death of the tenant for life. In *Buckle* v. *Fawcett* (*h*) real and personal estate were mixed together in one gift, and if in the case of a mixed fund *Cripps* v. *Wolcott* is to be followed, it does not follow that a gift of real estate by itself should receive the same

(*a*) 1 P. W. 663.
(*b*) 1 Dru. & War. 499.
(*c*) 1 H. L. Cas. 129.
(*d*) See Jarm. Wills, II. 616, 2d ed.; Hawkins on the Construction of Wills, 262.
(*e*) 4 Macq. 314.
(*g*) 21 Beav. 29.
(*h*) 4 Hare, 536.

construction. Moreover, in that case there was a direction to sell, and there was no gift but in the direction to divide and pay. *Young* v. *Robertson* (*a*) is a Scotch, not an English case. There was no gift but in the direction to divide and pay, and there were words which, according to the construction put upon them, distinctly referred to death during the tenancy for life.

To come to the authorities in our favour: in *Rose* v. *Hill* (*b*) the will was nearly identical with that now before the Court, and the judgment is supported by reasons which equally apply to the present case. Lord MANSFIELD decides the case on the ground that the words of survivorship were introduced to prevent lapse. *Mr. Turner* has urged that the same result would have been arrived at if the rule in *Cripps* v. *Wolcott* had been applied, and that is true; but the *ratio decidendi* is what is to be looked at. *Stringer* v. *Phillips* (*c*) is in point, for as appears (*d*) there was a tenancy for life. *Wilson* v. *Bayley* (*e*) was a considered decision of the House of Lords, and if in point must be treated as binding. In *Garland* v. *Thomas* (*g*) the *ratio decidendi* was that survivorship was to be referred to the death of the testator. In *Edwards* v. *Symons* (*h*) there were two other periods to which the words of survivorship * might be referred, but the Court referred them to * 435 the death of the testator. In *Doe* v. *Prigg* (*i*) the Court considered *Cripps* v. *Wolcott*, but looked upon itself as bound with respect to real estate by the decisions that applied a different rule. The reasons also in that case are satisfactory; it is more convenient, and more in accordance with the inclination of the Courts in favour of early vesting, to hold that the words of survivorship are introduced only to prevent lapse. It is true that the same reason would apply as to personalty, but if the rule as to personalty is inconvenient, its having been established as to that description of property is no reason for extending it to realty. There has not been a single well-considered case in which the decision in *Cripps* v. *Wolcott* has been followed with respect to real estate, and that case itself was decided upon a very imperfect review of the authorities, and the case of *The Commissioners of Charitable Donations* v.

(*a*) 4 Macq. 314.
(*b*) 3 Burr. 1881.
(*c*) 1 Eq. Ca. Ab. 293.
(*d*) 1 P. Wms. 97, ed. Cox.
(*e*) 3 Bro. P. C. 195.
(*g*) 1 Bos. & P. N. R. 82.
(*h*) 6 Taunt. 213.
(*i*) 8 B. & C. 231.

Cotter, (*a*) in which Lord ST. LEONARDS approved of and followed *Doe* v. *Prigg*, is a weighty authority against the appellants.

Mr. North, for the corporation. —The exception of costs occasioned by adverse litigation ought to have been inserted in the order. *Re Cant's Estate*. (*b*) Though we have not appealed, the whole case is open to us. *Watts* v. *Symes*. (*c*)

Mr. E. R. Turner, in reply.

Judgment reserved.

November 23.

*436 *THE LORD JUSTICE KNIGHT BRUCE. — The controversy in the present case is as to the construction to be put on the word "survivors" contained in the will, dated in the year 1832, of Mr. James Gregson, who died several years ago, survived by all the persons mentioned in it. The will was thus: [His Lordship read the will.] The testator's widow has lately died, having outlived six and been outlived by six of the twelve persons who besides herself were named in it as devisees of his real estate. And on her death the question already mentioned has arisen between the surviving six and the representatives of the other six devisees in remainder, — the surviving six claiming the whole, and the representatives of the other six disputing that claim, — the dispute turning, I repeat, on the meaning of the word "survivors" as used in the will. Now that, if the instrument is read and construed according to the ordinary rules of the English language as spoken and written by ordinary persons on ordinary occasions, the word "survivors" must be understood in the manner desired by the appellants; that is to say, as excluding the representatives of the deceased six, is, I think, plain and clear. But it is said against the appellants that the rules of English law concerning real estate, and especially concerning contingent remainders in real estate, as those rules existed before and when the will was made, render it incumbent on a Court to lean in favour of ascribing to the testator an intention to give to the twelve devisees in remainder respectively, if surviving him, interests vested at his death, and not as to

(*a*) 1 Dru. & War. 499.
(*b*) 1 De G., F. & J. 153.
(*c*) 1 De G., M. & G. 242.

any of them contingent interests or interests liable to be divested after his death. And in support of this proposition *Doe* v. *Prigg* and many other authorities have been cited. It has not, however, nor could reasonably have been, denied that the intention ascribed to the testator * by the appellants was an intention * 437 which he had a right by law to entertain and effectuate if he thought fit, or that if he had inserted in the will such a clause as this: "It is to be observed that by the word 'survivors' I mean such and only such of the twelve devisees in remainder herein named as shall outlive both myself and my wife," the appellants would have been entitled to what they seek. And my opinion is, that the will in its actual state as plainly exhibits and declares the testator's meaning and intention in using the word "survivors" to have been what the appellants contend, as if such a clause as I have just suggested had been inserted in it. The testator had a right to say, and has I think said, that those of the twelve who should die, living his wife, should be excluded in favour of those of the twelve who should survive both her and the testator himself; and if we are contradicting any authority in so holding, I consider that we are not contradicting *Wilson* v. *Bayley* or any other authority binding on the Court.

The Lord Justice TURNER, after stating the facts, proceeded as follows: —

The question which thus arises between the persons who survived the testator and those who survived the tenant for life certainly cannot fairly be stated otherwise than as a question of doubt and difficulty, having regard to the state of the authorities upon it, but it may as certainly be stated that it is in all cases purely and simply a question of intention. The sole question is, Did the testator intend to give the property in question to such of the twelve persons named in his will as should survive him, or to such of them only as should survive both him and his wife, the tenant for life under his will? This question must, of course, depend mainly, if not * wholly, upon the construc- * 438 tion to be put upon the particular devise contained in the will. The terms of the devise have been already stated. The doubt which arises upon it is, to what period did the testator

intend the survivorship to be applied, to his own death or to the death of his wife, the tenant for life?

I will first consider this point without reference to the authorities. The principle which in this point of view ought to be applied to the determination cannot, as I apprehend, be disputed. The words of a devise are to be construed according to their common and ordinary meaning and in the sense in which they would be understood by persons of common understanding. The word "survivors" is a term of relation. It must have reference to some particular period of time. It is in this will placed in immediate connection with the death of the testator's widow, the tenant for life under the will, "and on my wife's decease my will is that the above freehold property shall be divided, share and share alike, amongst the following persons or the survivors of them." No other period of time, except that of the death of the wife, is referred to by the testator. There is not in this clause, or, indeed, in any part of the will, any reference to the period of the testator's own decease. According to the ordinary and grammatical meaning of the word "survivors," it ought therefore, as it seems to me, to be referred to the death of the tenant for life. Besides, every testator must *primâ facie* be taken to assume that his devisees will survive him. The very fact of his devising to them proves that he is acting upon this assumption, for he must know that his will will take effect at his death, and that it cannot take effect in favour of persons who have died in his lifetime. Where, therefore, a testator uses words of survivorship with reference to his devisees,* the words ought not, as I conceive, to be construed as referring to the event of the devisees dying in the testator's lifetime, if there be any other period to which they can reasonably be referred. If, indeed, the devise be immediate, the words must necessarily be referred to death in the testator's lifetime, for in that case there is no other period to which they can be referred, and the testator, by using the words of survivorship, shows that he had in contemplation that the devisees might die in his lifetime; but if the devise be not immediate, if there be an estate created prior to the devise in which the words of survivorship are contained, it is surely more reasonable not to confine those words to the event of the devisees dying in the testator's lifetime, an event which the testator is *primâ facie* to be

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assumed not to have had in his contemplation. Considering this case, therefore, without reference to the authorities, it seems to me that, according to the true construction of this will, the property in question ought to have been held to belong to such only of the devisees in remainder as survived the tenant for life, and that the decision under appeal, if to be supported at all, must be supported, not upon principle, but upon the authorities. It is upon the authorities, indeed, that the Vice-Chancellor has rested his decision.

How, then, does the case stand in this point of view? It is now perfectly well settled, that in dispositions of personal estate, words of survivorship are to be construed as referring to the period of distribution. This is established by *Cripps* v. *Wolcott* and a long train of decisions following upon that case, and it was not even attempted to be denied at the bar that this is the state of the law as to personal estate, but it was said that as to real estate the law is otherwise, and that in cases of devises of real estates words of survivorship are to be * referred, not to the period * 440 of distribution, but to the period of the testator's death, and several cases were referred to in support of this position. The cases on which reliance was placed were *Stringer* v. *Phillips*, (*a*) *Rose* v. *Hill*, (*b*) *Wilson* v. *Bayley*, (*c*) *Garland* v. *Thomas*, (*d*) *Edwards* v. *Symons*, (*e*) and *Doe* v. *Prigg*, (*g*) and they are a fair sample of the many cases in which the same conclusion has been arrived at by the Courts of Law, for it cannot be denied that the Courts of Law have, as to real estate, leaned strongly in favour of the vesting at the death of the testator, whilst the Courts of Equity have, as to personal estate, leaned as strongly to the vesting at the period of division. The cases upon this subject are indeed irreconcilable, and in saying so I am only repeating what has been frequently said by other Judges. It is to be observed, however, as I have already said, that the question is one of intention, and that in the great majority of the cases there has been some context in the will which has been held to affect the decision. In *Rose* v. *Hill* and *Wilson* v. *Bayley*, for instance, there were other dispositions in the will which were taken, in the

(*a*) 1 Eq. Cas. Ab. 293; and 1 P. Wms. 97.
(*b*) 3 Burr. 1881.
(*c*) 3 Bro. P. C. 195.
(*d*) 1 Bos. & P. N. R. 82.
(*e*) 6 Taunt. 213.
(*g*) 8 B. & C. 231.

one case in the judgment, and in the other in the reasons of appeal, to support the vesting at the death of the testator. In *Stringer* v. *Phillips* and *Doe* v. *Prigg*, however, there does not appear to have been any such context, and it was upon these cases, and especially upon the latter of them, the respondents mainly relied; but these cases do not stand unaffected by adverse decisions. In *Buckle* v. *Fawcett*, a case in which both real and personal estate was involved, the Vice-Chancellor Sir
*441 JAMES *WIGRAM, notwithstanding the case of *Doe* v. *Prigg* was cited, held that the survivorship ought to be referred to the period of division, and in *Taylor* v. *Beverley*, which, however, was a case of personal estate only, my learned brother came to a similar conclusion; and what is more important the House of Lords, in *Wordsworth* v. *Wood*, pointedly disapproved of the case of *Doe* v. *Prigg*. Whether this disapproval was meant to apply generally, or to apply only to survivorship being referred to the death of the testator in the case of a devise to a class, does not indeed appear, and I do not think, therefore, too much reliance ought to be placed upon the *dicta* in *Wordsworth* v. *Wood;* but, in the subsequent case of *Young* v. *Robertson*, the House of Lords appears to me to have held very decidedly that the general rule must be taken to be, that survivorship is to be referred to the period of distribution.

In this almost painful conflict of authorities, we must consider the reasons of the conflicting decisions. It is plain enough upon what the decisions as to personal estate have proceeded. They are founded, and, for the reasons which I have given, are in my opinion strongly founded, upon the intention of the testator, and we may confine our attention therefore to the decisions as to real estate. It was said for the respondents that the difference between these decisions and the decisions as to personal estate is attributable to the different sources from which the law as to real and as to personal estate is derived, but the governing question under both laws is and always has been treated as being the intention of the testator. The law is subordinate to the intention. It comes into force only when the intention has been ascertained, and it cannot, as it seems to me, constitute the medium by which the intention is to be ascertained. If, indeed, it was settled that in all
*442 cases of real estate *survivorship was to be referred to the death of the testator, and that in all cases of personal estate

it was to be referred to the period of division, it might possibly be that a different intention ought to be imputed to the testator according to the different nature of the property to which his disposition might apply; but if every case in which the question arises depends upon the intention to be collected from the will, it certainly cannot be said that the law is settled: to this extent I quite agree with the observations which the Vice-Chancellor Sir JAMES WIGRAM has made upon this point in the case of *Buckle* v. *Fawcett*. The cases as to real estate in which the survivorship has been referred to the death of the testator appear to have proceeded upon one or other of these grounds, that unless the vesting was held to take place at the death of the testator, the remainders would be contingent and liable to be destroyed, that in order to avoid this and other inconveniences incident to the tenure of real estates, the law favours the early vesting of estates, and that the danger of lapse is avoided or diminished by the survivorship being referred to the period of the testator's death; but the danger of lapse is common both to real and personal estate, and as to the other grounds, I confess it is not satisfactory to my mind that a forced and strained construction should be put upon the words of a testator's will in order to meet the inconveniences of tenure. I think that the words of a will ought to be construed according to their natural and ordinary meaning, unless they are qualified by context or there be a settled rule of law affixing a different meaning upon them. It was objected to the case of *Young* v. *Robertson*, to which I have referred, that the case depended upon the law of Scotland, and that the disposition in that case was of real and personal estate blended together, but the judgment warrants me in saying that the law of Scotland as to questions of this * nature is * 443 the same as the law of England, and no reliance is placed in the judgment upon the blending of the real and personal estate.

Upon the whole, looking to the intention of this testator, which, in my opinion, is the governing point of the case, and looking also to the state of the authorities, I cannot but think that, however this case might have been decided in times long gone by, it ought now to be decided in favour of the appellants, and that the fund in question ought to be divided between such only of the devisees in remainder as survived the tenant for life. Our order, therefore, will be accordingly. I have said nothing as to the effect of the power of sale given to the widow, because I prefer to decide this

case upon broad and general grounds, but having regard to some of the cases, I am not sure that the creation of this power does not furnish the appellants with further ground of argument.

We were asked, on the part of the corporation of Liverpool, to alter the order as to costs, but the corporation have not appealed, and, in my opinion, this is not a case in which the order, even if wrong, which I by no means say that it is, can be altered in their favour without an appeal on their parts.[1] The question of costs is entirely distinct from the question of right, and depends upon wholly different considerations. The costs of all parties of the appeal should, I think, be paid out of the fund.

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* 444 * BLOXSOME *v.* CHICHESTER.

1864. December 21. Before the LORDS JUSTICES.

A defendant having filed a written answer, but omitted to file a printed copy, the plaintiff applied for a direction to the clerk of records and writs to give the usual certificate to set down the cause on motion for decree: *Held*, by the Lord Justice TURNER, the Lord Justice KNIGHT BRUCE doubting, that the plaintiff could not be allowed to waive the filing a printed copy of the answer, and must proceed as if no answer had been filed.

THE bill in this cause was filed on the 16th of July, 1863, and interrogatories for the examination of the defendant Chichester, in answer to the bill, were delivered to his solicitor on the 29th of the same month.

No answer having been put in, an attachment was issued on the 1st of December, and on the 10th he was arrested. On the same day he filed a written answer, and upon the certificate of the clerk of records and writs that an answer had been filed he obtained his discharge from custody.

The defendant omitted to file a printed answer. The plaintiff applied to the clerk of records and writs for the usual certificate to set down the cause on motion for decree. (*a*) The clerk of records and writs declined to give such a certificate, on the ground that no

(*a*) See Braithw. Rec. & Writ Practice, 490.

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1488, 1489.

printed answer having been filed, the written answer after the expiration of four days was to be treated as no answer, and the plaintiff did not waive an answer.

The plaintiff applied to the Master of the Rolls for a direction to the clerk of records and writs to give a certificate, and for liberty to read the written answer as an affidavit on the motion for decree, but his Honor concurred in the view taken by that officer and refused the application, which was now renewed before the Lords Justices.

* *Mr. Babington*, for the application. — The Order of the *445 6th March, 1860, rule 3, does not say that the answer shall be a nullity, but only that the defendant shall be subject to the same liabilities as if no answer had been filed.

THE LORD JUSTICE KNIGHT BRUCE. — Unless the Lord Justice thinks otherwise, I for my part feel disposed to accede to the application.

THE LORD JUSTICE TURNER. — I am afraid that the only proper course is to attach the defendant for want of answer. It seems to me that if we were to allow plaintiffs to waive the filing of printed answers the objects of the order would be defeated.

1864. December 21. Before the LORDS JUSTICES.

The good-will of a partnership business having been ordered to be sold by the Court in a suit instituted by the surviving partner, it was directed that the advertisements and particulars of sale should contain a notice that the sale would not prevent any person theretofore interested in the business from carrying on the like business in the same town.

THIS was an appeal motion to vary an order of the Master of the Rolls as to the mode of advertising the sale of the good-will of a business which was being disposed of in the suit.

The bill was filed by a surviving partner to wind up a business which he and his deceased brother had carried on as wine and

spirits merchants under the firm of Samuel Johnson & Sons. The usual decree having been made with an inquiry as to the most beneficial way of disposing of the assets, the chief clerk certified that it was most beneficial that the business should be sold as a going concern.

An advertisement was accordingly prepared, which described the subject of sale as follows: —

"The good-will of that extensive and old established wholesale business of wine and spirit merchants carried on for many years by the late well-known firm of Samuel Johnson & Sons at Wath. Together with the extensive newly built freehold warehouse, offices, and premises situate at Wath-upon-Deane aforesaid, together with the usual trade fixtures. And with the exclusive right in the purchaser to hold himself out as the successor to the said firm of Samuel Johnson & Sons."

The plaintiff, who had obtained leave to bid at the sale, took out a summons to vary this advertisement by inserting a
* 447 statement that he was at liberty to carry on * the same business in the same town. The Master of the Rolls was of opinion that the advertisement as it stood was calculated to mislead, and made an order that notice should be given in the advertisements and particulars of sale that the plaintiff W. Johnson would be at liberty to continue carrying on the business of a wine and spirit merchant in the same town and place. One of the executors of the deceased partner now moved to discharge this order on the ground that it would unduly prejudice the sale.

Mr. Hobhouse and *Mr. Waller*, for the appellant. — To introduce such a clause as that directed by the Master of the Rolls will tend to deter purchasers. It is not a vendor's duty to insert in conditions of sale a notice calling attention to the disadvantages of the property, — he is only bound not to insert any thing calculated to mislead. Now, there is nothing misleading in selling the "good-will" of a business without any notice that the sale will not prevent the surviving partner from carrying on a similar business in the same town, it being settled law that it has not that effect. A special notice of this kind, being of an unusual description, will lead everybody to suppose that this sale is subject to some special

disadvantage, whereas the purchaser will only be in the ordinary position of a purchaser of a good-will, as settled by *Cruttwell* v. *Lye*, (*a*) *Hall* v. *Barrows*, (*b*) and *Churton* v. *Douglas*. (*c*) If any alteration is made in the advertisement as originally prepared, we submit that it should merely be the omission of the words as to the exclusive right.

Mr. Faber, for the other executors.

* *Mr. Baggallay* and *Mr. Charles Hall*, for the plaintiff, in * 448 support of the order of the Master of the Rolls. — We admit that the old rule, that the partnership name belongs to the surviving partner, has been changed, and that the right to use the name of the firm is now a partnership asset, and that such right ought to be sold to the best advantage; but it must be sold fairly. As the advertisement stood, a purchaser would be misled. He would naturally suppose that as the surviving partner and the executors of the deceased partner concurred in the sale, he would have the exclusive right of carrying on the business without competition by any of them. The argument of the other side is that the property will be unduly depreciated by telling the purchaser the truth. The subsequent proceedings in *Cook* v. *Collingridge*, (*d*) which are reported in Coll. Partn. (*e*) are decisive in our favour.

Mr. Hobhouse, in reply. — In *Cook* v. *Collingridge* no good-will was sold.

THE LORD JUSTICE TURNER. — There is no doubt that this Court, which is constantly complaining of deception in conditions of sale, ought to be careful not to issue particulars or conditions of sale which can reasonably be thought deceptive. Apart from the authorities, I should have been inclined to think that if the words "good-will of the business" had been used without the words of which the plaintiff complains, that would have been enough; but, looking at the case of *Cook* v. *Collingridge*, I cannot say that such an alteration in the particulars would be sufficient to prevent the * description from being calculated to mislead. It has * 449

(*a*) 17 Ves. 335.
(*b*) 9 Law T. (N. S.) 561, L. C.
(*c*) Johns. 177.
(*d*) Jac. 607.
(*e*) Page 215.

been contended that in *Cook* v. *Collingridge* the good-will was not sold, but I think that it was sold as incident to the business premises.

Subject to any observations that may be made, I think that the proper variation to be made in the particulars will be to strike out the words "with the exclusive right in the purchaser to hold himself out as the successor to the said firm of S. Johnson & Sons," and to add at the foot of the particulars this note: "The sale will give to the purchaser both the premises in which the business has been carried on and the benefit to be derived from the habits of the customers resorting to such premises, but it will not prevent any of the persons heretofore interested in the business, or those who may represent them, from carrying on the like business."

THE LORD JUSTICE KNIGHT BRUCE. — In my judgment the order of the Master of the Rolls is substantially right, and I think that it is of little consequence whether the particulars of sale are drawn up in the form directed by him or in that proposed by the Lord Justice. As the Lord Justice prefers the form which he has read, I accede to it.

Reg. Lib. 1864 A. f. 2546.

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* 450 * PARKINSON *v.* HANBURY.[1]

1865. January 14, 16. Before the LORDS JUSTICES.

H. & Co. were in the receipt of the rents of leasehold property as agents of P. In 1834 P. died intestate. In 1838 H. & Co. rendered to his daughter an account, to which some objections were taken by her, which were answered, and no replies made to the answers. In 1845 the daughter took out administration to P., and in 1852 filed a bill against H. & Co. for an account: *Held*, that the account must be treated as a settled account, and that the bill could not be sustained.[2]

Property being put up for sale by a first mortgagee was bought by a second incumbrancer to whom the equity of redemption had been conveyed on trust for sale on default in payment of his debt. This sale having been set aside

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[1] S. C. affirmed, L. R. 2 H. L. 1.

[2] See Hunter *v.* Belcher, *ante*, 194, and citations in note (2); Parkinson *v.* Hanbury, L. R. 2 H. L. 1.

at the suit of the representative of the mortgagor: *Held*, that the possession of the purchaser was to be referred to the character of trustee,[1] and that the account of the rents received by him was not as of course to be on the footing of wilful neglect and default.[2]

Per the L. J. TURNER. The second incumbrancer, being not an ordinary mortgagee, but a trustee for sale, was incapacitated from purchasing.[3]

THIS was an appeal by the plaintiff from part of a decree of Vice-Chancellor KINDERSLEY. (*a*)

On the 26th of March, 1823, John Farrell Parkinson, the father of the plaintiff, mortgaged to Thomas Chambers, for 2000*l*., a leasehold public-house called the Royal Oak, and eight leasehold houses which were held under another lease. This mortgage contained a power of sale, to be exercised after three months' notice to the mortgagor, his executors, administrators, or assigns, with the usual clause exonerating a purchaser from inquiring whether such notice had been given.

On the 10th of January, 1828, Parkinson, being indebted to Hanbury & Co., assigned the equity of redemption in the Royal Oak only to T. B. Aveling, a member of the firm of Hanbury & Co., and on their behalf, upon trust, in case default should be made in payment of the moneys due on or before the 25th of March then next, to sell the property, to pay out of the sale moneys the expenses and any arrears of rent, then pay what was due to Chambers on his security, then pay to Hanbury & Co. what was due to them, and pay the surplus to Parkinson, his executors, administrators, or assigns.

(*a*) 1 Drew. & Sm. 143.

[1] See Lamson *v.* Drake, 105 Mass. 564; Page *v.* Linwood, 4 Cl. & Fin. 399.

[2] See Coope *v.* Carter, 2 De G., M. & G. 292, and cases in note (1); 2 Dan. Ch. Pr. (4th Am. ed.) 1370; 3 ib. 2061, note (1); Bond *v.* McWatty, 14 Ir. Ch. Rep. 174; Sleight *v.* Johnson, 3 K. & J. 292; O'Connell *v.* O'Callagan, 15 Ir. Ch. Rep. 31; Lewin Trusts (5th Eng. ed.), 652; Lamson *v.* Drake, 105 Mass. 564; Parkinson *v.* Hanbury, L. R. 2 H. L. 1, 15; Adams *v.* Sworder, *ante*, 44; Lord Kensington *v.* Bouverie, 7 De G., M. & G. 134; Sherwin *v.* Shakspear, 5 De G., M. & G. 517, 531; Kerr F. & M. (1st Am. ed.) 348; Trevelyan *v.* Charter, 4 L. J. Ch. 214; Neesom *v.* Clarkson, 2 Hare, 163.

[3] See 1 Sugden V. & P. (8th Am. ed.) 65, note (*g*), 66, note (*p*[1]), 67; 2 ib. 687 and notes (*a*) and (*d*), and cases cited, 688, note (*n*), 689, note (*v*); Kirkwood *v.* Thompson, *post*, 613; 2 H. & M. 392; Shaw *v.* Bunny, *post*, 468; 3 Beav. 494; 1 Dart V. & P. (4th Eng. ed.) 30; Kerr F. & M. (1st Am. ed.) 157, 158; Dyer *v.* Shurtleff, Mass. Suff. March, 1873.

*451 *On the 10th of May, 1828, Parkinson gave to Mr. Aveling, on behalf of the firm of Hanbury & Co., a written authority to manage and to receive the rents of the eight houses and of another small property not included in either of the above securities, and to apply them in satisfaction of the mortgages. Mr. Aveling thereupon, with the consent of Mr. Chambers, entered into the receipt of the rents, not only of the property to which the authority extended, but also of the Royal Oak, it apparently being understood that the memorandum, which was not very clearly worded, extended to the Royal Oak.

On the 6th of October, 1831, Parkinson died intestate, and from Lady-Day, 1834, Mr. Aveling gave up the collection of the rents. Possession was taken by Mr. Chambers, who, in October, 1834, put up the property for sale under his power. The defendants, Messrs. Hanbury & Co., bought the Royal Oak, and completed the purchase in due course. At this time there was no legal personal representative of Parkinson.

On the 7th of March, 1838, the defendants, Messrs. Hanbury & Co., rendered to Miss Parkinson an account of the rents and profits, both of the Royal Oak and the other property, received by Mr. Aveling down to the time of his discontinuing the receipt, as mentioned above. Miss Parkinson took some objections to the accounts, which were speedily answered, and she returned no reply to the answers. The accounts, which also contained a statement of what was due to Hanbury & Co. from Parkinson, showed a considerable balance to be due from him.

On the 8th of February, 1845, Miss Parkinson took out *452 letters of administration to her father's estate, and in *1852 she filed the present bill, praying an account of what was due on the security of Messrs. Hanbury, for an account of rents of the Royal Oak against them as mortgagees in possession, for an account of rents of the other properties on the footing of wilful neglect and default up to the time when Chambers took possession, and that it might be declared that, notwithstanding the assignment by Chambers, the plaintiff was entitled to redeem the Royal Oak, and for redemption accordingly. No specific errors in the accounts rendered in 1838 were alleged and proved.

Vice-Chancellor KINDERSLEY, before whom the cause was

heard, (*a*) considered that, as to the property other than the Royal Oak, the long acquiescence in the account rendered in 1838 debarred the plaintiff from all right to relief, and he accordingly dismissed the bill, so far as it asked for an account of the rents of that part of the property. With respect to the Royal Oak, his Honor considered that, as a general rule, there was no reason why a second mortgagee might not purchase from the first mortgagee selling under a power of sale; (*b*) but that in the circumstances of the present case, as Messrs. Hanbury & Co. were not ordinary mortgagees, but rather trustees for sale, it was a question whether a purchase by them could be allowed. His Honor, however, held that it was unnecessary to decide that question, for that as, to the knowledge of the purchasers, Parkinson had been dead three years, and had no personal representative, the sale, being made under a power which required notice to the mortgagor or his representatives, could not be sustained, and that the clause exonerating the purchaser from seeing to the fact of notice having been given was no protection to him * where he knew that notice * 453 could not be given. His Honor made a decree against Messrs. Hanbury in the usual form of a decree against a mortgagee in possession, except that the account of rents was not on the footing of wilful default. Miss Parkinson appealed from so much of the decree as dismissed the bill with respect to the account of the rents of the eight houses, and the objection was also taken that the account of the rents of the Royal Oak ought to have been on the footing of wilful neglect and default.

Miss Parkinson appeared in person in support of her appeal.

Mr. Glasse and *Mr. Kay*, for the defendants. — The account of rents must be treated as settled after such long acquiescence. Assuming that the period after the father's death, during which the plaintiff was not his personal representative, does not count, still the delay since she took out administration is fatal to any claim to treat the account as open, and the bill makes no case for opening it if settled. As to the rents of the Royal Oak, we ought not to account on the footing of wilful neglect and default, for on

(*a*) 1 Drew. & Sm. 143.

(*b*) See Shaw *v.* Bunny, *infra*, 468.

the sale being set aside we are remitted to our position as agents. [*Lawless* v. *Mansfield* (*a*) was referred to.]

Miss Parkinson, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — I think that in this case no mortgage title in the defendants has been established by the plaintiff, except, perhaps, as regards the Royal Oak. As to that I assume the existence of a mortgage title. Assuming this, * 454 there * may be a right to redeem, and yet not as against a mortgagee in possession. I am inclined to think that such is the case here, and that the account ought not to be taken against the defendants on that footing. In my judgment no error has been established against the decree.

THE LORD JUSTICE TURNER. — I also am of opinion that the decree is right. There are two properties to be considered, the property included in the defendants' mortgage and the property not so included. As regards the first, the circumstances are as follows: There was a mortgage to Chambers for 2000*l.* of the Royal Oak, the eight houses and other property. Afterwards a mortgage was made to the defendants of the Royal Oak only. This was the state of things in January, 1828. In May, 1828, the mortgagor gave to the second mortgagees written authority to enter into possession of and manage certain property not included in their mortgage, the authority not extending to what was so included. The defendants, assuming the authority to extend to the whole property, entered into possession of the whole. The mortgagor died in 1831, and in 1834 they gave up possession of the whole property; they therefore were not in possession as mortgagees after 1834, assuming that they ever had been so. Then, in 1838, an account was delivered of the whole of the rents which they had received while in possession under the memorandum, including the rents and profits of the Royal Oak. Some questions were raised upon this account by the plaintiff, who was not then the personal representative of the mortgagor. They were answered by the defendants, and no further dispute took

(*a*) 1 Dru. & War. 556.

place. In 1845, letters of administration of the estate of the mortgagor were granted to the plaintiff, and this bill * was not filed till 1852. There is no charge in the bill of * 455 any specific errors in the account. That account was delivered in 1838 to a person entitled to take out administration; she raised questions upon it at the time, which were answered at the time; she became administratrix seven years afterwards, and then does not file a bill until seven years after taking out administration. Under these circumstances the account must be treated as a settled account, and as the bill makes no case for disturbing it, the decree, as regards this part of the case, appears to me perfectly correct.

Now, as to the property which was included in the mortgage, I was at first much struck by the omission of the words relating to wilful neglect and default, but on further examining the case I think they were rightly omitted. The possession of the defendants was, I think, originally referable to the memorandum, and not to their title as mortgagees. If they were not originally in possession as mortgagees, is the Court to refer their possession under their purchase to a mortgage title? It is clear that they never intended to take possession as mortgagees. I do not intend to give any opinion whether a second mortgagée is disabled from purchasing where a first mortgagee is selling under a power of sale. Whether that be so or not, I agree with the view of the Vice-Chancellor, that in the present case the defendants were trustees, and could not purchase. The purchase being set aside on that ground, I think that the defendants must be considered to have been in possession as trustees since the purchase, and that the account has rightly been directed not on the footing of wilful neglect and default.

* 456 * *In Re* the UNITED KINGDOM SHIP OWNING COMPANY, LIMITED.

FELGATE'S CASE.

1865. January 11, 18. Before the LORDS JUSTICES.

F. signed the memorandum and articles of association of a company. After signature, but before registration, a sheet of the articles was taken out and a new sheet substituted for it without his privity, but with the approbation of the persons then managing the company. There was a conflict of evidence as to whether the contents of the substituted sheet were identical with those of the old one, and whether there was not a material alteration: *Held*, that the articles were not binding upon F., that the articles and memorandum must be taken as together constituting one instrument, and that F. was not a contributory.

Per the Lord Justice TURNER, if the substitution of a sheet in a deed after execution does not *ipso facto*, without reference to the question whether there is any variation in the contents, make the deed void, as to which *quære*, at all events it makes the deed void, unless it be most clearly proved that the contents of the old and the substituted sheet are identical, or at least that there is no material difference between them.[1]

If a person is induced to take shares on the faith of a promise by the promoters of a company, which promise is not kept, he is, nevertheless, a contributory, his remedy being only against the persons who made the promise.[2]

THIS was an appeal by Mr. William Felgate from an order of the Master of the Rolls including his name in the list of contributories.

The company was registered on the 28th of March, 1862. Mr. Felgate, on the 25th of that month, had signed the memorandum and articles of association as a subscriber for twenty shares, and, as he alleged, under a promise from the promoter that he should be appointed the broker of the company and indemnified from all

[1] See Peel's Case, L. R. 2 Ch. Ap. 674; Commonwealth *v.* Emigrant Industrial Savings Bank, 98 Mass. 12; Chitty Contr. (11th Am. ed.) 1161 and note (*q*), 1163 and note (*c*), 1163 and notes (*f*) and (*g*); Nichols *v.* Johnson, 10 Conn. 192; Boyd *v.* McConnell, 10 Humph. 68; Lee *v.* Alexander, 9 B. Mon. 25; Adams *v.* Frye, 3 Met. 103; Smith *v.* Crooker, 5 Mass. 538, 540; Bowers *v.* Jewell, 2 N. H. 543.

[2] See Elkington's Case, L. R. 2 Ch. Ap. 511; Rogers's Case, L. R. 3 Ch. Ap. 633.

risk. He never received any notice that he was appointed broker, he never paid the deposit on his shares, nor heard any thing more of the company until, in April, 1864, he was served with a notice of the intention to include him in the list of contributories of the company, which had been ordered to be wound up.

Mr. Felgate, in opposition to the application of the official liquidator, set up the case that the articles of * association * 457 had, after he signed them, and without his knowledge, been materially altered before registration, and he contended that they, therefore, were not binding on him, and that he was not a shareholder. By his affidavit he stated that upon the faith of the above-mentioned promises he signed the memorandum and articles of association on the 25th of March, 1862, at the office of Mr. Hodges, the promoter, and left the office immediately afterwards. He further stated that he had been informed and believed that after he had signed the articles, and between the 25th and the 28th of March, one of the sheets of the articles, which sheet contained the names of the persons who were to be appointed directors, was removed, and another sheet substituted for it, and such original sheet destroyed. He further stated that he was not in any way cognizant of such sheet having been removed until recently, and that he had never re-signed or re-executed the articles with the new sheet.

One of the provisions in the articles was, that the promoter should have, by way of remuneration for his services and the expenses incurred by him in getting up the company, a first charge on the funds of the company for the amount of 3*l.* per cent on the capital. A Mr. Callow, who was one of the persons actively employed in getting up the company and a shareholder, deposed that at the meeting of the 25th of March, 1862, he read over to the meeting the articles of association, which were signed on that day, and that the provisions contained in them on the above subject, being the 14th clause, expressly provided that the 3*l.* per cent should be computed on the "subscribed capital" of the company, and he referred to discussions both before and at the meeting in confirmation of this statement. In the articles as registered the * words were "nominal capital," instead of * 458 "subscribed capital."

Mr. Callow further deposed that at the time when he read over the articles which were signed at the meeting, they contained a

clause to the following effect between the 15th and 16th paragraphs: "The following persons are and shall be the first directors of the company," and that there followed the names of the first directors, which were filled in at the meeting by Mr. Callow. The articles as registered contained no such clause.

Mr. Callow further deposed that he had examined the articles in the office for the registration of joint-stock companies, and was satisfied that after they had been signed a sheet had been taken out and another substituted for it.

Mr. Scott, the solicitor who prepared the articles, positively denied in his evidence the alleged substitution of "nominal capital" for "subscribed capital," and stated that the articles had always provided for the promoter's percentage being on the nominal capital.

As regarded the substitution of a sheet, Mr. Scott deposed as follows: —

"On the 25th day of March, 1862, a meeting was held at No. 48 Lombard Street, and another ingrossment of the articles of association in the words of the said articles as filed, with the exception of the words 'the following persons are hereby declared to be the first directors of the company, viz.,' and of the words of the last article thereof, was read I believe by Mr. E. Callow to the persons there assembled. Much conversation took place of
* 459 a desultory nature between different groups of * such persons as to the probable operations of the company, and the said last-mentioned engrossment was handed about to be looked at by several of such persons, all or most of whom had pens and ink and paper before them and some of whom were writing. Something was said about foreign agents to the company, and I saw the said E. Callow writing on the said engrossment; I thereupon told the said J. C. Hodges that he should see what was being done with the articles as the persons at the other end of the room appeared busy upon them, and that I could not properly interfere, and I was moreover under the disadvantage of being a total stranger to them all. The said J. C. Hodges then obtained the said articles, and it appeared that in a blank space that was left at the bottom of the fifth page thereof for the insertion of the names of the first directors, several persons had written their names in a column as signatures, and also that the said E. Callow had added an article at the end, such added article forming the

last clause of the said articles. I then pointed out to the said William Henry Hodges, who just at that time entered the room, that the names or signatures so inserted had spoiled the engrossment of the articles and that they must be done again; but the said William Henry Hodges stated that the meeting were all very anxious to avoid further delay and would not hear of an adjournment. A person present whom I did not know, but now suppose to have been Mr. Brice or Mr. Felgate, heard me speaking to the secretary about the engrossment, and inquired what was the matter, and I explained to him that some signatures had been put in the wrong place by being put in the blank space left for names of the first directors, whereupon the said person said it was further wrong than I thought of, for it was not intended that the names of the directors should appear in the articles of association at all; but that after * the articles were completed the * 460 directors were to be appointed by a substantive resolution to be entered in the minute-book. This was then mooted aloud by the said person and was generally acquiesced in; but not in any more formal way than by indications of common assent. Save the said names or signatures no other names or matter whatever was written in the said blank space. The said William Henry Hodges or I (but I cannot remember which of us) then scored out the words 'the following persons are hereby declared to be the first directors of the company, viz.,' and the said names or signatures. And it was not until the same had been scored out and the said additional article inserted by the said Edward Callow that the said articles were executed. The accuracy of my statement with respect to a separate appointment of directors and the resolution evidencing the same will appear from the minute-book of the said company, wherein the proceedings of the said meeting are entered in the handwriting of the said Edward Callow.

"13. The said articles were executed in my presence by the several persons who appear thereby to have executed the same. After their execution, and to the best of my remembrance and belief before any person who attended the meeting had left, the said William Henry Hodges drew attention to the slovenly and irregular appearance thereof occasioned by the expunging of the words before mentioned as to the first directors, and the expunging or smearing out the names or signatures that followed them, and

stated that he was afraid the registrar of the joint-stock companies would refuse to register them unless this portion thereof was re-written. The said articles were written on three sheets of foolscap, and the disfigured and blotched portion thereof was on the first page of the second sheet, that is to say, on the fifth page of
* 461 * the articles. The said William Henry Hodges or the said James Clifford Hodges afterwards took the said articles to Messrs. Waterlow, the law stationers, and directed the second sheet to be fair copied, and such fair copy was put in the place of such disfigured portion, which was, I believe, thereupon destroyed. Such second sheet was the only part rewritten. The first sheet containing the words "nominal" is that same identical sheet that formed the first sheet of the articles when they were read and executed. The whole of such fair copy was in the same identical words, and no more and no less than the words in the whole sheet so disfigured, save that the said words "the following persons were hereby declared to be the first directors of the company, videlicet," and such names or signatures were omitted, and the omission of such words was directed and assented to prior to the execution of the articles.

"14. The said articles as registered were printed by the direction of the said James C. Hodges, and, as I believe, by order of the directors of the said company. The said directors, on the day after the execution of the said articles and always thenceforth, recognized, adopted, and acted upon the same in every way that became necessary or expedient, although, as hereinafter appears, they became exceedingly anxious to modify them with respect to the provisions therein relating to the promoter."

The Master of the Rolls decided that Mr. Felgate ought to remain on the list of contributories, and ordered him to pay the costs of the application. Mr. Felgate appealed.

Mr. Baggallay and *Mr. Cracknell*, for the appellant. — The promise that Mr. Felgate should be the broker of the com-
* 462 pany was never fulfilled, and the company * accordingly never treated him as a shareholder. They cannot now, after the company has proved a failure, insist upon his having that character which they never previously admitted. But if we fail on this ground, we say that the substitution of a sheet in the

articles of association, materially different from that which was there when Mr. Felgate signed them, entirely frees him from all liability. The company which was formed was made by this substitution a different one from that in which Mr. Felgate agreed to be a shareholder.

Mr. W. Pearson, for the official liquidator. — The contest by the appellant is not against the persons who committed the alleged fraud, but against subsequent innocent shareholders who took shares on the faith of Mr. Felgate's name being there. As to the promise that the appellant should be appointed broker, there is nothing in that part of the case; he does not himself connect that promise with the taking shares, but, if he had done so, the promise was one which Hodges had no authority to make on behalf of the company. But suppose the company to have adopted it, there is nothing to show that it has ever been broken. The appellant's name appears in the minute-book as broker, and no other person was ever appointed. As to the appellant's never having been called upon to pay calls or deposit, that is only attributable to negligence on the part of the officers of the company. A recognition by the company of an agreement made by Hodges cannot be inferred without some positive act. Then as to the alterations of the articles. It is clear on the evidence that as regards "nominal capital" there has not been any alterations at all, the sheet which was re-engrossed not being the one which contains that expression. Then, as regards the sheet which was substituted, according to Scott's evidence, it was only a fair copy of the sheet for which it * was * 463 substituted, with the alterations which had been made before execution, and, at all events, the alterations had been agreed to at the meeting, and if they had not been, they were immaterial and cannot make the articles void. The appellant is complaining of the acts of his own agents. By signing the articles and memorandum he became a member and promoter of the company, and made the secretary and solicitor his agents. He now attempts to impeach their acts in order to get rid of his liability to innocent third parties who have been misled. His signing the memorandum of association alone made him a member; it is not alleged that the memorandum has been altered, he therefore cannot be heard to say that he is not a member of the company. The registration is conclusive on all parties: 19 & 20 Vict. c. 47, § 13; and if Mr. Felgate

has any right to relief, his proper mode of proceeding is to apply to vacate the registration. This alteration was either a wrongful act by a third party, in which case it has no effect at all, or it was an alteration by Mr. Felgate's own agent, by which he is bound. He was one of the persons bound to take care of the articles and is seeking to take advantage of his own negligence. He does not venture to swear that when he signed the articles he believed them to be different from what they are. He might be entitled, as against the parties who altered the instrument, to say that it was void as against him, but he cannot be entitled to take advantage of immaterial alterations as against innocent parties who subsequently took shares.

Mr. Cracknall, in reply. — The Act contains no provision for rectifying articles of association, perhaps a bill for that purpose might lie, but the contention of the respondent is that the articles are right as they stand, so that there is no common error
* 464 * which is requisite for rectification.

[The Lord Justice Turner. — Can the unauthorized act of Scott in altering the instrument affect the liability of the parties?]

The act was unauthorized as against me, but he was acting on behalf of and by the authority of the governing body of which I was not a member. It is said that the alteration is immaterial, but it is most material; Mr. Felgate signed as a simple shareholder, the effect of the alteration was to make him a director. (*a*) In *Richmond's Case* (*b*) relief was given on account of the interpolation of a sheet, and see *Sheffield's Case*. (*c*)

Judgment reserved.

January 18.

The Lord Justice Knight Bruce. — In this case the act of Mr. Scott in substituting one sheet for another in the deed did not, I think, bind the appellant, it not having been in my opinion virtually or otherwise authorized by him. But it was, I conceive, so far authorized by persons having at the time the conduct of the

(*a*) 19 & 20 Vict. c. 47, § 9, Table B., clause 45.
(*b*) 4 K. & J. 305. (*c*) Johns. 451.

affairs of the company or intended company in question as to vitiate the deed against Mr. Felgate, who from the time of the substitution (as the matter seems to me) ceased to be bound by the instrument. My opinion is accordingly with the appellant.

THE LORD JUSTICE TURNER. — I am also of opinion that the appellant's name ought to be struck off from the list of contributories.

* Two points were relied upon in support of the appeal. * 465
First, that the appellant had been induced to take shares in the company by a promise that he should be appointed to be the company's broker, and that this promise had not been fulfilled; and secondly, that the articles of association of the company had been altered after they were executed by the appellant.

As to the first point I have felt no doubt. The appellant has not, in my opinion, made out any case entitling him as against the company to be relieved from the obligation consequent upon his having taken the shares. If he was deceived into taking them, his remedy is against the person who deceived him, and not against the company.

The case in my opinion depends wholly on the second point, the alteration of the articles after they were executed by the appellant. That the articles were altered after the appellant executed them is not disputed. It appears from the respondent's own evidence that after the appellant had executed these articles, one sheet of them was removed and a new sheet substituted in its place. I am by no means satisfied that this alteration in the articles was not of itself sufficient to vitiate them, so far as the appellant is concerned, without reference to the question whether the effect of the articles was or was not altered by the change which was made, for although it is true that it is not every alteration in a deed after its execution which will vitiate the deed, no case, so far as I am aware, has gone so far as to say that an entire sheet of a deed may be removed and a new sheet substituted for it without that effect being produced, and it is obvious that there is a great difference between the case of an alteration in a deed which appears * upon the face of it and the case of a sheet of the deed * 466
being withdrawn and another sheet substituted for it. In the one case the materiality or immateriality of the alteration

must appear upon the face of the deed, in the other case it must depend entirely upon extrinsic evidence as to the identity of the substituted sheet with the sheet which has been removed, or as to the extent of the difference between them. In my opinion, however, it is not necessary for us in this case to decide this general question. This I think, at least, is clear, that where a sheet in a deed has been removed and another sheet substituted for it, there ought, in order to maintain the deed, to be evidence proving beyond all doubt or question that the sheets were identical, or that there was no material difference between them, and the evidence in this case does not satisfy me of this. The affidavits of Callow and of Scott seem to me to be directly at variance on this point, and I am not prepared to say that greater credit is due to Scott than to Callow.

It was urged for the respondent, in support of his contention that the appellant was bound by the articles, that Scott ought to be considered to have been the appellant's agent, and that the appellant therefore was bound by his acts; but even assuming that there was an agency for preparing the deed, which upon the facts of the case seems to be doubtful, the agency must I think have determined when the deed was executed. It was also urged for the respondent that the appellant ought to be held bound by reason of his having executed the memorandum of association, and of the provisions of the Act with reference to such memorandums, but I think that the memorandum and the articles of association must be taken together, and that if the appellant is not bound by
*467 the articles he cannot be held bound by the *memorandum.

The Act, I think, carries the case no further than to bind a subscriber to the memorandum of association as he would have been bound if he had covenanted to conform to its regulations, and if I am right in considering that the memorandum and the articles are to be taken together, and that the appellant was not bound by the articles, I do not see how he could be bound by such a covenant, nor do I think it was necessary for the appellant, as the respondent contended it was, to apply (if he could so apply) to discharge the registration. It is sufficient for him to show that he is not liable. Of course what has been said has no reference to cases in which the articles as altered have been adopted or acted upon. There is no such case here so far as the appellant is con-

cerned. In my opinion, therefore, this order ought to be discharged, and any costs paid under it refunded; but I think the appellant is not entitled to the costs of the proceedings against him, and that there should be no costs of the appeal.

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*SHAW *v.* BUNNY. *468

1864. November 7. 1865. January 19. Before the LORDS JUSTICES.

Where a first mortgagee duly exercises a power of sale, and a subsequent mortgagee becomes the purchaser, such subsequent mortgagee, in the absence of any thing to impeach the *bona fides* of the transaction, acquires the same irredeemable title as if he were a stranger.[1]

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls.

The suit was by a mortgagor for the redemption of a mortgage dated the 24th of October, 1853, by which four houses, Nos. 14, 15, 16, and 17, in Donnington Square, in the parish of Speen, in the county of Berks, and several other houses and some lands, were mortgaged in fee by the plaintiff to the defendants Edward Brice Bunny and Charles Slocock for securing the sum of 6000*l.* and interest with the usual proviso for redemption.

It was not at the time of the execution of this mortgage known

[1] See Knight *v.* Majoribanks, 2 Mac. & G. 10 and note (1); 2 Sugden V. & P. (8th Am. ed.) 689 and note (*v*); Parkinson *v.* Hanbury, *ante*, 450; Kirkwood *v.* Thompson, *post*, 613; Waters *v.* Groom, 11 Cl. & Fin. 684; Ford *v.* Olden, L. R. 3 Eq. 461; 1 Dart V. & P. (4th Eng. ed.) 30; Dyer *v.* Shurtleff, Mass. Suff. March, 1873. Where the power of sale authorizes the mortgagee or his assignee to become the purchaser at the sale, a purchase by him will be valid, if the proceedings are otherwise unobjectionable; but in such case a Court of Equity will hold him to the strictest good faith and the utmost diligence in the execution of the power, for the protection of the rights of the mortgagor, and if he fails in either, the mortgagor may redeem the estate notwithstanding the sale. Montague *v.* Dawes, 14 Allen, 369, 373. In Montague *v.* Dawes, 12 Allen, 397, it was held that the assignee, having become the purchaser upon a sale under the power of sale, and the title having been made to him accordingly, might by his deed thereafter convey a good title to a *bonâ fide* purchaser from him without notice. The power of sale expressly authorized the mortgagee or his assignee to become the purchaser at the auction sale under it.

to the defendants, the mortgagees, that the four above-mentioned houses were subject to any prior mortgage, but it was afterwards discovered that by an indenture dated the 2d August, 1852, these four houses had been mortgaged in fee to John Henry Hughes Hallett and Henry Williams Hodgson, for securing the sum of 1000*l.* and interest at 5*l.* per cent with full powers of sale, and that by another indenture dated the 3d of August, 1852, they had been further mortgaged in fee to Henry Hughes Hallett for securing the sum of 1000*l.* with interest at the same rate and with the like powers of sale.

In the year 1855 John Henry H. Hallett and H. W. Hodgson in exercise of their power of sale, after an ineffectual attempt
* 469 to sell the four houses by public auction, * agreed to sell them to the defendant E. B. Bunny for the sum of 1100*l.*, and thereupon, by an indenture bearing date the 28th of December, 1855, and made between J. H. H. Hallett and H. W. Hodgson of the first part, Henry H. Hallett of the second part, and the defendant E. B. Bunny of the third part, reciting that H. H. Hallett had, at the request of the defendant E. B. Bunny, agreed to join in the conveyance, the four houses were, in consideration of the sum of 1100*l.*, conveyed by the said J. H. H. Hallett and H. W. Hodgson, with the consent and approbation of H. H. Hallett, to the defendant Edward B. Bunny in fee.

The plaintiff filed his bill against Bunny and Slocock for the redemption of the whole property. This was resisted as regarded the four houses, on the ground that the defendant E. B. Bunny had become absolute owner of them by the above-mentioned sale. The Master of the Rolls was of opinion that the contention of the defendants was well founded, and made a decree containing a declaration that E. B. Bunny was absolutely entitled to the four houses. As to the rest of the property the usual redemption decree was made.

Mr. Baggallay and *Mr. W. Morris*, in support of the appeal.—We contend that a second mortgagee cannot buy from the first, and that, by his purchase, he only takes a redeemable estate. *Baldwin* v. *Bannister* (*a*) and *Murrell* v. *Goodyear* (*b*) support our contention. The second mortgagee stands in a fiduciary position

(*a*) 3 P. Wms. 251, *n.* (*b*) 1 De G., F. & J. 432.

towards the mortgagor and cannot avail himself of it to his own advantage, and to the prejudice of the mortgagor. His duty as mortgagee is to make the property realize as * much as * 470 possible, his interest as purchaser to get it sold for as little as possible.

[THE LORD JUSTICE TURNER. — If a second mortgagee buys in the first mortgage, does he hold it as a security for the full amount or only for what he pays ?]

We submit only for what he pays. *Davis* v. *Barrett* (*a*) appears to be against us, but is distinguishable, for an heir-at-law does not occupy the same fiduciary position.

Mr. Selwyn and *Mr. E. F. Smith*, for the respondents. — If the appellant could make out a case of fraud or collusion, or of undue advantage taken, as in *Murrell* v. *Goodyear*, he might succeed ; but no case of the kind is made here. In *Baldwin* v. *Bannister* the first mortgagee had been paid off. Now a paid-off mortgagee is a mere trustee and stands in a totally different position from an unsatisfied mortgagee. If a first mortgagee sells, what principle is there to prevent a second mortgagee from bidding, if the transaction be *bonâ fide?* A mortgagee is not a trustee. If he buys an incumbrance for less than its value, he holds it for its full amount. *Darcy* v. *Hall*, (*b*) *Morret* v. *Paske*. (*c*) *Dobson* v. *Land* (*d*) shows what his position is. In *Davis* v. *Barrett* the heir was also an incumbrancer, and it was by reason of his being an incumbrancer that he was held entitled to keep the security for its full amount.

Mr. Baggallay, in reply.

Judgment reserved.

January 19.

* THE LORD JUSTICE KNIGHT BRUCE. — The only point in * 471 this case not settled by arrangement between the parties, as I understand, is the question of the correctness or incorrectness of

(*a*) 14 Beav. 542.
(*b*) 1 Vern. 48.
(*c*) 2 Atk. 52, 54.
(*d*) 8 Hare, 216, 220.

the declaration which the decree at its outset contains, and which, if to be altered, would have to be followed necessarily by alterations connected with the change. That declaration is in these terms: [His Lordship read the declaration.] Is the declaration thus made well or ill founded? Its correctness or incorrectness turns, I apprehend, merely on the point, whether, when a landed estate has been twice mortgaged by the owner, so that there are several distinct mortgagees not connected with each other, one first, the other second, and the first mortgagee having a power of sale duly exercises it, the second mortgagee becoming the purchaser, such a state of things prevents him from acquiring by means of the purchase that absolute and irredeemable title against the mortgagor which a stranger making the purchase would have acquired. The Master of the Rolls has held that it does not, and that the second mortgagee has, under his purchase, in the absence of special circumstances, the same absolute and irredeemable title as a stranger purchasing would have had. And there being, I think, not any special circumstance in the present instance to prejudice or affect the purchaser's right, his title against the mortgagor to the benefit of the purchase seems to me also as absolute as that of a mere stranger purchasing would have been. I consider, I repeat, in accordance with the view of the Master of the Rolls, that there was nothing to preclude the second mortgagee from buying in the circumstances in which he bought and retaining his purchase. If, indeed, he had availed himself of his position as a mortgagee to procure some facility or advantage leading to the purchase
* 472 or connected with it, that might have * made a difference.

But I see no such case. It seems to me immaterial that the purchaser would not (if he would not) have been informed of the intended sale had he not been a mortgagee.

I cannot give a voice for disturbing the declaration made at the outset of the decree.

The Lord Justice TURNER, after stating the facts, proceeded as follows: —

The principal question in this case is, whether the defendant, E. B. Bunny, is entitled by virtue of this purchase to hold the four houses as the absolute owner thereof, freed and discharged from any right on the part of the plaintiff to redeem them. The Master

of the Rolls has been of opinion that the defendant, E. B. Bunny, is so entitled, and has accordingly so declared by his decree, which in other respects is the usual redemption decree. The plaintiff has appealed from the whole of the decree.

As to the principal question, the case is by no means free from difficulty, and my opinion upon it has fluctuated much. In the ordinary case of a subsequent mortgagee buying in a prior mortgage for less than the amount which is due upon it, he is entitled, as against the mortgagor, to hold the prior mortgage for its full amount; this Court does not hold him to be a trustee for the mortgagor of the benefit of the purchase which he has made; but these cases involve no change of character in the mortgagee who has made the purchase; he still stands in the position of mortgagee only, and the sole question is, on what terms the right of redemption, which does not exist at law, ought in equity to be given to the mortgagor. It is not so in the case of a subsequent
* mortgagee purchasing from a prior mortgagee under a * 473
power of sale, and claiming to hold the purchase as his own absolute property discharged from any right of redemption. In such a case the claim involves an entire change of character in the person who has made the purchase. His claim is to be wholly discharged from his character of mortgagee, — from the contract into which he must have entered to reconvey to the mortgagor on payment of the money secured by the mortgage, — and from the trust for such reconveyance which would attach upon him upon such payment being made. I cannot, therefore, but feel very serious doubt whether the case of a purchase from a prior mortgagee under a power of sale, and the simple case of buying in a prior mortgage for less than is due upon it, ought to be considered as standing upon the same footing, and certainly, if authority could have been found to support the distinction between these cases, I should not have hesitated to follow it, for I much doubt the right of a mortgagee to denude himself of that character, and of the obligation which he has undertaken and the trust which would attach upon him to reconvey on payment of the money secured to him by his mortgage. The case of *Baldwin* v. *Bannister* (*a*) was cited in support of this distinction; but, on examining that case in the registrar's book, I do not think it bears out the distinction. The

(*a*) 3 P. Wms. 251, note (*d*).

case was no more than this: The mortgagor being dead, the mortgagee bought in the dower of his widow, and by his answer he stated that he had purchased the dower for 50*l*., and claimed to have that sum allowed him. The decree was for an account of what was due upon his mortgage and of the rents and profits which he had received, with a direction that the 50*l*. should be allowed him in account. The case, therefore, was no more than
* 474 * this: that the mortgagee had bought in the dower of the mortgagor's widow for 50*l*. and claimed to be repaid that sum upon the mortgage being redeemed, and it was decreed accordingly, apparently without dispute, and certainly there was no claim by the mortgagee to hold the dower which he had purchased adversely to the mortgagor. I find myself, therefore, in this position, that there is no authority to support the distinction which I am inclined to favour, and that there are opposed to it the opinions both of the Master of the Rolls and of my learned brother, and not only those opinions, but also the opinion of the Vice-Chancellor, Sir R. T. KINDERSLEY, who, in the case of *Parkinson* v. *Hanbury*, (*a*) has expressed himself strongly upon the point. Under these circumstances I feel myself compelled, though not without much reluctance, to submit to the decree upon this point being affirmed. It was further objected to this decree that special inquiries ought to have been directed as to some alterations made by the defendants in the mortgaged premises, and as to the repairs and improvements; but I think that the plaintiff has failed in making out any case for special inquiries, and that the decree as it stands meets the justice of the case in these respects. The addition of special inquiries in cases in which the ordinary forms of the court meet the justice of the case is always, in my opinion, inexpedient. This appeal, therefore, will be dismissed, but I think it should be dismissed without costs.

(*a*) 1 Drew. & Sm. 143. See S. C. on appeal, *supra*, 450, for distinction where the second mortgage is by way of trust for sale.

*WILSON *v.* THE WEST HARTLEPOOL RAILWAY COMPANY. *475

1864. November 8, 9, 16, 17. 1865. January 19. Before the LORDS JUSTICES.

An agent of a railway company, without any direct authority, agreed to sell to the plaintiff a piece of land of the company at a certain price per acre. Some of the terms were that the company should lay down a branch railway to the land — that the plaintiff, who was going to erect iron-works on the land, should use the company's railway in preference to others — use it whenever reasonably practicable, and for the longest distance it was reasonably capable of use — and that the traffic to and from the works should be conveyed on the terms of a certain prior agreement of the 8th of May between the parties relating to another piece of land bought by the plaintiff from the company, and the other stipulations of that agreement carried out. The company's surveyor measured the land, the company's engineer laid down the branch railway to it, the plaintiff was let into possession, and his machinery was brought in the company's wagons to the land, and there deposited. After this the company refused to complete the sale. On an appeal from a decree of the Master of the Rolls directing specific performance: —

Held, by the Lord Justice TURNER, *dissentiente* the Lord Justice KNIGHT BRUCE, that the stipulations as to the use of the defendants' railway by the plaintiff did not render a decree for specific performance improper; for that the insertion of a covenant to that effect would effectuate what the parties must be held to have contemplated.

Held, by the Lord Justice TURNER, that although the company's agent contracted without sufficient authority, the company must be held by its acts to have ratified the contract, and that the contract thereby became binding on the company, although not under their common seal, nor executed in any other of the modes mentioned in 7 & 8 Vict. c. 16, § 97, and that specific performance ought to be decreed, especially as possession had been given.[1]

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[1] See Angell & Ames Corp. (9th ed.) § 304, and cases cited; Lowe *v.* London and N. W. R. Co., 18 Q. B. 632; 1 Dart V. & P. (4th Eng. ed.) 176 and note (*s*); Sherman *v.* Fitch, 98 Mass. 59; Lester *v.* Webb, 1 Allen, 34; Brown *v.* Winnisimmet Co. 11 Allen, 326; Moss *v.* Averell, 6 Selden, 449; Olcott *v.* Tioga R. Co., 27 N. Y. 546; Shaver *v.* Bear River M. Co., 10 Cal. 396; Church *v.* Sterling, 16 Conn. 388; Crook *v.* Corporation of Seaford, L. R. 6 Ch. 551. "Though not perhaps absolutely necessary," Mr. Dart observes, "it is very desirable that the agent of a railway company or other corporation should be appointed under the corporate seal. The company may by their conduct adopt and ratify the act of an unauthorized agent; but experience has shown that, in dealing with a public company, the only safe course is to require strict proof of the agent's authority." 1 Dart V. & P. (4th Eng. ed.) 168; see also ib. 174–176.

Held, also, by the Lord Justice TURNER, that the fact of no sufficient evidence having been given of the contents of the prior agreement of the 8th of August did not prevent a decree for specific performance, for that where possession has been given under an agreement the Court will, if possible, ascertain the terms of the agreement, and give effect to them.[2]

The doctrine of part performance, as regards incorporated companies, considered.[3]

Per the Lord Justice TURNER. A purchaser's being let into possession is enough to take a contract out of the Statute of Frauds, whether the vendor or the purchaser is seeking specific performance.[4]

THIS was an appeal by the defendants from a decree of the Master of the Rolls ordering specific performance of an agreement for the sale of a piece of land to the plaintiff.

The defendants were entitled to certain lands adjoining the western side of their railway in the neighbourhood of West Hartlepool. In 1859 the plaintiff became desirous of establishing iron-works close to the railway, and, with a view to the purchase of land for

[2] The existence, nature, and terms of the contract must be made out by clear and satisfactory evidence, to entitle a party to specific performance, although the agreement be in part performed. 1 Sugden V. & P. (8th Am. ed.) 154, 155 and note (*f*), and cases cited; Mortal *v.* Lyons, 8 Ir. Ch. Rep. 112; Rice *v.* O'Connor, 11 Ir. Ch. Rep. 510; Phillips *v.* Thompson, 1 John. Ch. 131; Parkhurst *v.* Van Cortlandt, 1 John. Ch. 284; German *v.* Machin, 6 Paige, 288; Hall *v.* Hall, 1 Gill, 383; Moale *v.* Buchanan, 11 Gill & J. 314; Waters *v.* Howard, 8 Gill, 277; Owins *v.* Baldwin, 1 Md. Ch. 123; Phyfe *v.* Wardwell, 1 Edw. Ch. 51, 52; Tilton *v.* Tilton, 9 N. H. 385; McGibbeny, 53 Penn. St. 332; Sage *v.* M'Guire, 4 Watts & S. 228, 229; Chambers *v.* Lecompte, 9 Missou. 575; 1 Story Eq. Jur. §§ 763, 764; Kerr F. & M. (1st Am. ed.) 135, and cases in note (4).

[3] In Jacobs *v.* The Peterborough & Shirley R.R. Co., 8 Cush. 223, it appeared that the owner of land, through which a railroad company were authorized to make their road, gave them a bond to convey to them by a certain day, on payment of a specified sum of money, so much of his land as should be taken by them by authority of law for the purposes of their road; and the company, within the time allowed by law, entered upon and took the land for the purposes of their road; but, on the owner's tendering them, on the day named in the bond, a deed of the land so taken, refused to pay him the stipulated sum of money; and it was thereupon held, that the agreement, not having been signed by the company, could not be specifically enforced against the company in equity. This decision was, however, made before full equity powers had been conferred upon the Court, and under authority of the decisions in Massachusetts, that the Court would not decree specific performance of contracts within the Statute of Frauds, on the ground of part performance.

[4] See 1 Sugden V. & P. (8th Am. ed.) 151–154, and notes.

that purpose, obtained an introduction to a Mr. Chester, since *deceased, who was the traffic manager of the com- *476 pany, and frequently acted for them in matters relating to the sale of land, the extent of his authority being, however, one of the matters in dispute in the cause. On the 8th of August, 1859, the plaintiff agreed with him for the purchase of a part of the above-mentioned lands on terms which did not appear, the contract not being forthcoming. This contract was approved by the directors, and the plaintiff was let into possession.

In November, 1859, a negotiation took place between the plaintiff and Mr. Chester, with a view to the plaintiff's acquiring some lands of the company on the east side of the railway and giving up the land which he had purchased on the west side. The terms of the agreement come to were embodied in the following papers.

On the 7th of November, 1859, Mr. Chester wrote to the plaintiff as follows : —

" West Hartlepool Harbour and Railway.

" General Manager's Office.

" West Hartlepool, Nov. 7, 1859.

" Dear Sir, — On condition that you return to this company the piece of land on the west side of the railway bought of them in August last, I now beg to offer to sell you the three pieces of land shown on the plan given you, containing respectively, No. 1 about ten acres [here followed particulars], at the rate of 220*l.* per acre, subject to the conditions and stipulations on which you bought the before-mentioned piece of land in August last, viz. : —

" 1. The land shall be used for the purpose of erecting works, and dwelling-houses shall not be erected on it, with the exception of such as you may require for the use of yourself or your own men.

" 2. Traffic to and from the works shall be conveyed on *the terms stated in the agreement made on the 8th *477 August, 1859, and the other stipulations of that agreement fully carried out.

" 3. The West Hartlepool Harbour and Railway Company shall bring a sufficient supply of suitable water for the use of the works.

" 4. The right of using the ditch at the railway side for the drainage of waste water, not containing sewage matter, to be given you.

"5. The right of tipping refuse from the works over any of the company's tips which may be accessible shall be given you, or, if requested, the company will agree to remove all such refuse, &c., you may require removing, and deposit it at the places at which they may for the time being deposit ships' ballast, charging you only the actual cost to themselves of such haulage, or should you prefer to find your own wagons and power to convey such refuse to the ballast deposit, you shall be allowed the use of the place of deposit and the intervening road free of expense.

"6. The West Hartlepool Harbour and Railway Company will lay down two lines the entire length between the main line and the land now offered for standage, and for your exclusive use, and no other line or other work or erection shall be placed on any portion of the land which lies between the present line of railway and the land now offered. The company will also put in such points and crossings as may be required, and carry connecting lines from them to the railway fence.

"The West Hartlepool Harbour and Railway Company will also agree not to put any erection on that part of the sea banks which lies between the dwelling-house you intend to erect and the sea, nor to do any thing to intercept the view from or to create a nuisance to the house. Should the company at any time wish to let or sell the banks which lie between the land now offered
* 478 and the *sea or any part of them, you shall have the first offer of them.

"The projected bridge and existing road from Mr. Bastow's foundry to Cliff House farm buildings shall be closed, and a new bridge over the railway erected and a new road formed at the southern extremity of the property, so as to form a direct communication from the sea-beach to the road on the west side of the railway now called Seaton Road.

"Right of way from this land to the sea-beach at two or three points shall be secured to you, and liberty given to you to tip refuse, slag, &c., on the banks or shore, so far as this company has the power to give such right, and provided the commissioners of the bay do not prevent it.

"I remain, dear sir, yours faithfully,

"P. pro The West Hartlepool Harbour and Railway Company,

"J. B. Wilson, Esq., "SAMUEL CHESTER."

"Haydock, near St. Helen's, Lancashire."

Enclosed in this letter was a schedule headed "Schedule referred to." This schedule contained various particulars of rates of carriage, and then proceeded as follows:—

"The railway company shall be bound to haul, convey, and forward, and give the same facility of transit to all goods coming from other companies' lines in other companies' wagons as they do the traffic which is carried in their own wagons and confined to their own line. They shall also be bound to forward traffic over other lines in West Hartlepool Harbour and Railway wagons, or to send West Hartlepool Harbour and Railway wagons to other lines for the traffic of or for J. B. Wilson & Co., charging the usual and fair and reasonable charges * for the * 479 use of such wagons after leaving their own line.

"Term of years, 42.

"Dues to be paid in cash for each month before the expiration of the succeeding month.

"The schedule of charges to include all terminal siding or station charges, but to be exclusive of loading and unloading.

"The company to contract to lead, carry, and convey over any main line or branch now belonging to or hereafter to belong to the said company to, from, or towards any iron-works now belonging to or hereafter to belong to or now occupied by or to be occupied by the said J. B. Wilson, and to provide the usual and proper wagons, trucks, or carriages, engine or motive power, and to contract to keep well supplied with empties, and conduct the traffic with the greatest possible regularity and despatch.

"If rates reduced below this by any agreement subsequent to this date to any persons in the same trade or under similar circumstances, the like reduction to be made to J. B. Wilson.

"J. B. Wilson & Co. agree to use the West Hartlepool Harbour and Railway in preference to all others, to use it whenever reasonably practicable and for the longest distance it is reasonably capable of use.

"Arbitration clause to be inserted.

"Pr. pro The West Hartlepool Harbour and Railway Company,

"West Hartlepool, Nov. . SAMUEL CHESTER."

On the 15th of November the plaintiff wrote to Mr. Chester

unconditionally accepting the terms of the offer, and requesting him to send as early as possible the draft of a formal con-
* 480 tract for perusal. On the 16th Mr. Chester * wrote to the plaintiff, saying that he would give the company's solicitor the requisite instructions, and stating that Aird, the company's surveyor, was going on with the measurements and plan of the pieces of land. This correspondence was duly entered in the books of the company kept in Mr. Chester's private office belonging to the company.

In the same month of November, 1859, the measurements were completed, and a quantity of machinery which the plaintiff had bought and placed upon the land purchased in August was carried over to one of the new pieces of land. Other machinery of the plaintiff which had been landed at the West Hartlepool Harbour was brought in the company's wagons to and deposited upon the same piece of land. The resident engineer of the company laid down rails to the land in conformity with the agreement, and made borings for the purpose of obtaining the stipulated supply of water. All these acts were done in the same month.

It was alleged in the evidence of the defendants, that on the 6th of December, Mr. Watson, one of the directors, saw the rails, and being then for the first time informed of the sale, stated to Chester that it was made without authority. It was further deposed to, that on the following day the plaintiff's solicitor was informed by one of the directors that the company would not sell the land. The plaintiff, however, denied having had any notice until August, 1860, that the defendants repudiated the contract, and it was admitted that no written notice to that effect was given him until that time. It was undisputed that until the 6th of December, 1859, he had no notice whatever that the company repudiated the contract.

* 481 * After December, 1859, the company, being desirous to retain the pieces of land in question, negotiations took place as to the company's finding the plaintiff another site for his works instead of them, but no suitable site could be found, and at last, in August, 1860, as has been stated above, the company gave the plaintiff a formal written notice of their repudiation of the contract. Mr. Chester had died in the preceding March. The company persisting in their refusal to complete the contract, the present bill was filed.

As regarded the authority of Mr. Chester to enter into such a contract, it was clear that he was not constituted the agent of the company by any instrument under seal. The evidence did not show that he had any general authority to sell the lands of the company or any particular authority to sell this land. It showed, however, such a course of dealing, that in the opinion of the Master of the Rolls he was held out by the company as an agent having full authority to contract on their behalf in such matters, but no opinion was given on this point by the Lords Justices.

The plaintiff in his evidence deposed that the agreement of the 8th of August contained no other terms than those which were to be found in the letter and the schedule.

The Master of the Rolls was of opinion that the company had held out Mr. Chester as their general agent, and had, in this particular case, ratified the contract by acts in the nature of part performance. His Honor accordingly held the contract to be binding on the company, and made a decree for specific performance, from which the company now appealed.

* *The Attorney-General* (Sir R. PALMER) and *Mr. Fry*, * 482 in support of the decree. — If Chester was authorized to contract, the Statute of Frauds is out of the case, and if he was not duly authorized, there is a ratification and part performance, so that if we were dealing with an individual instead of a company, there would be nothing to argue in the case. Now if Chester had been appointed an agent by instrument under seal, it is difficult to allege any reason why the company should not be bound, unless the Companies Clauses Act prohibits the entering into a contract in that way. That Act (*a*) regulates contracts by companies, and under it a contract which by common law must be under seal, must be under the seal of the company; a contract by writing not required by the common law to be under seal may be under the hands of two directors, and a contract good at common law if made by parol may be made by parol by a committee of directors. But the words are permissive only, and do not say that the company shall not be bound unless the contract is made as there mentioned. Then why may not the company be bound by the contract of their agent? The agent need not be appointed by seal any

(*a*) 8 & 9 Vict. c. 16, § 97.

more than within the Statute of Frauds he need be appointed by writing; a minute of the directors appointing him agent would be good. But we do not mainly rely on the contract as a good written contract binding on the company in its inception, we rely on part performance. Supposing that the Companies Clauses Act does require a seal, that Act is not stronger than the Statute of Frauds, and acts of part performance which, on the ground of fraud, take a case out of the latter statute will also take it out of the former.

London & Birmingham Railway Company v. *Winter*, (*a*) *483 *Laird* v. *Birkenhead* *Railway Company*, (*b*) *Earl of Lindsey* v. *The Great Northern Railway Company*, (*c*) *Williams* v. *The St. George's Harbour Company*, (*d*) *Pauling* v. *The London & North-Western Railway Company*. (*e*)

Sir H. M. Cairns, *Mr. Hobhouse*, and *Mr. Hawkins*, for the appellants. — On the evidence it is clear that Chester had no express authority to enter into this contract, and the letter of 15th November, 1859, shows that the plaintiff did not consider that there was a binding contract. As to his being held out to the world as having such authority, we are taken by surprise, the case not being alleged in the pleadings. Then, as to the contract having been ratified, it is plain that the directors never in any way sanctioned it. Laying the plaintiff's machinery on a waste piece of land was not a thing to attract notice; but as soon as the rails were laid down the attention of the directors was called to the matter, and they objected. There is a good defence, moreover, under the Statute of Frauds. Chester's letter embodies by reference the terms of the agreement of the 8th of August, but that agreement is not proved. This makes a fatal gap which cannot be supplied. *Ridgway* v. *Wharton*. (*g*) Thus far the case is the same as if the company were an individual; but the fact of the defendants being a company makes, we submit, an important difference. It is of great consequence that the Courts should not be too ready to hold companies bound by the acts of their officers, who are very apt to overstep the bounds of their authority. Now, by the common law, an incorporated company generally is not

(*a*) Cr. & Ph. 57.
(*b*) Johns. 500.
(*c*) 10 Hare, 664, 700.
(*d*) 2 De G. & J. 547.
(*e*) 8 Exch. 867.
(*g*) 3 De G., M. & G. 677; 6 H. L. Cas. 238.

bound, except by a contract under its common seal. *Mayor, &c., of Ludlow* * v. *Charlton.* (*a*) This rule is somewhat * 484 relaxed by the Companies Clauses Act. The law is well summed up in Lindley's Partner. (*b*) But under that Act a contract required to be in writing must be signed by two directors. Unless the case comes within that rule the common seal is requisite. The Court will not hold that an agent can do an act without the solemnities which would be required if his principal did it. Suppose a single director signed a contract, agency might be urged, but to give effect to such a contract would be flying in the face of the express terms of the Act. Then as to part performance, the doctrine has never been applied against a corporation. The principle on which it proceeds is, that there being a contract valid at common law, but incapable of being enforced by reason of the Statute of Frauds, the Court hold that acts of part performance take the case out of the statute; but in the case of a corporation there is no contract valid at law if it is not in writing. There cannot be part performance of a void contract. There are, indeed, cases where after a person who has entered into a parol agreement with a corporation has, on the footing of that agreement, done acts which confer an important benefit on the corporation, specific performance has been decreed against them; but those cases go on the ground of fraud, not of mere part performance. *The London and Birmingham Railway Company* v. *Winter* (*c*) was a case in which the company had taken the land in question, and destroyed it, so that the parties could not be replaced *in statu quo*. *Earl Lindsey* v. *The Great Northern Railway Company* (*d*) lays down the principle for which we contend; that the equity against a company in such cases is not founded on contract, but on fraud. In *Williams* v. *St. George's* * *Harbour Company*, (*e*) * 485 there was a judgment at law against the company, and irreparable damage had been sustained by the plaintiff, and the Lord Justice KNIGHT BRUCE rests his judgment on that ground. In *The Leominster Canal Navigation Company* v. *The Shrewsbury and Hereford Railway Company* (*g*) the bill was dismissed because there was no agreement under seal, though there was part performance, and there was a breach of faith on the part of the

(*a*) 6 M. & W. 815.
(*b*) Page 207.
(*c*) Cr. & Ph. 57.
(*d*) 10 Hare, 679, 700.
(*e*) 2 De G. & J. 547.
(*g*) 3 K. & J. 654.

defendants. *The Midland and Great Western Railway Company of Ireland* v. *Johnson* (*a*) also supports our contention, that there cannot be a decree for specific performance against an incorporated company on the ground merely of such acts of part performance as would be sufficient against an individual; there must be irreparable damage. Even as between individuals, part performance must be an act prejudicial to the party relying on it or beneficial to the other. With the exception of one old and meagrely reported case in 1685, there is no case in which delivery of possession has been held to be part performance as against the vendor, unless it has been followed by expenditure on the property, though no doubt mere delivery of possession is enough as against the party who takes possession.

[Their Lordships here intimated the opinion that a purchaser's being let into possession was sufficient part performance, whether the contract was sought to be enforced by him or against him.]

We submit that none of the later authorities support that view. *Morphett* v. *Jones*, (*b*) *Seagood* v. *Meale*, (*c*) *Buckmaster* v. *Harrop*. (*d*)

[The Attorney-General referred to *Lincoln* v. *Wright*, (*e*) *Pain* v. *Coombs*. (*g*)]

*486 Here the acts * relied on are very slight; the only expenditure has been by the company. Acts done by a party to his own prejudice cannot be a ground for decreeing specific performance against him. Sugd. Vend. & Purch. (*h*) The contract, moreover, is incapable of specific performance as against the plaintiff, since the Court could not enforce against him the indefinite contract to use the defendants' railway as much as he can, and it therefore will not be enforced in his favour. That a covenant to that effect should be inserted in the conveyance is not the bargain between the parties, and the Court will not interfere and decree

(*a*) 6 H. L. Cas. 798.
(*b*) 1 Sw. 172.
(*c*) 2 Eq. Ca. Abr. 49; Prec. in Ch. 560.
(*d*) 7 Ves. 340.
(*e*) 4 De G. & J. 16.
(*g*) 1 De G. & J. 34.
(*h*) Page 147 (11th ed.).

such a covenant. *Gervais* v. *Edwards*, (*a*) *Ogden* v. *Fossick*, (*b*) *Hills* v. *Croll*, (*c*) *Stocker* v. *Wedderburn*, (*d*) *Peto* v. *Brighton*, *&c.*, *Railway Company*. (*e*)

The Attorney-General, in reply. — As to the non-production of the agreement of the 8th of August, there is nothing to exclude the plaintiff's evidence that all the terms are expressed in the letter and the schedule. *Mundy* v. *Jolliffe*, (*g*) *East India Company* v. *Nuthumbadoo Veerasawmy Moodelly*, (*h*) *Parker* v. *Taswell*. (*i*) As to the contract containing stipulations which the Court cannot enforce, the cases referred to on the other side to show that the execution of a deed containing covenants to perform them cannot be ordered are inapplicable. Here the parties contemplated the execution of a deed containing covenants. Such expressions as "the company will agree," "right of way shall be secured," the company to contract," * "arbitration * 487 clause to be inserted," prove this beyond doubt. The covenants might be incapable of being enforced in equity, so are the covenants in a lease, yet it is the every-day course of the Court to decree the execution of the lease containing them. In *Gervais* v. *Edwards* and *Hills* v. *Croll* there was not any executory agreement contemplating the executing of a future deed. In *Ogden* v. *Fossick* the Court held on the construction of the agreement, that a covenant to do the acts would not satisfy it, but that the actual performance of them was what was contracted for. *Granville* v. *Betts*, (*k*) *Wilson* v. *Wilson*. (*l*) Then, as to the signature of the contract by an agent of the company, the 97th section of the companies Clauses Act is an enabling clause, and it designedly leaves the question as to signature by an agent at large; and there is nothing in it to prohibit an agent's being appointed in any way, either under seal or not. But whether the agent was duly authorized or not, the confirmation of the contract is clear, it being undisputed that from the 16th of November to the 5th of Decem-

(*a*) 2 Dru. & War. 80.
(*b*) 11 W. R. 128, L. J.; [S. C. 4 De G., F. & J. 426].
(*c*) 2 Phill. 60.
(*d*) 3 K. & J. 393.
(*e*) 1 H. & M. 468.
(*g*) 5 M. & C. 167.
(*h*) 7 Moo. P. C. C. 482, 497.
(*i*) 2 De G. & J. 559.
(*k*) 18 L. J. (N. S.) 82.
(*l*) 1 H. L. Cas. 538; 5 H. L. Cas. 40, 61.

ber the officers of the company acted upon the agreement, without any notice being given to the plaintiff or his solicitor that the company objected to it.

Judgment reserved.

1865. January 19.

THE LORD JUSTICE KNIGHT BRUCE. — In the argument of this appeal several points of some importance have been raised and ably discussed, on which I do not consider it necessary to pronounce an opinion.

*488 *It appears to me that there are provisions in the agreement, of which performance is sought by the bill in the cause and has been decreed, which exclude specific performance.

I agree that there may be and have been cases in which it may well be and has been held that there may, under a bill for specific performance of a contract, be a decree against a defendant to execute a deed containing covenants on his part to do acts of which, from their nature, specific performance could not directly be enforced. But the present I think not a case of that description, at least as to the clause which, stated in paragraph 8 of the bill, is in these words: "J. B. Wilson & Co. agree to use the West Hartlepool Harbour and Railway in preference to all others, to use it whenever reasonably practicable and for the longest distance it is reasonably capable of use." I conceive it not to have been intended that this part of the agreement should be satisfied by the execution of any other instrument, so as to give the company in this respect, in case of breach of it on the plaintiff's part, only a right to recover damages.

I am of opinion that the words "to use it whenever reasonably practicable and for the longest distance it is reasonably capable of use" render a decree for specific performance in the present instance unfit to be made, and are probably not the only provisions in the same instrument which do so.

Of course I have not failed to observe the words "to contract to lead, carry, and convey," or the words "and to contract to keep well supplied," or the words "arbitration clause to be inserted," which the agreement contains.

*489 *I think that the bill should be dismissed without costs, and that there should be no costs of the appeal. My learned

brother, however, being of opinion, as he will state, that the appeal should be wholly dismissed, of course it will be so, and I need not say that he is very likely to be right.

THE LORD JUSTICE TURNER. — This is a suit for specific performance of an agreement alleged to have been entered into by the defendants the company, acting by Samuel Chester their agent, for the sale by the company to the plaintiff of some pieces of land on the east side of the company's railway and between the railway and the sea. The agreement sought to be enforced is contained in two letters, by one of which, dated the 7th November, 1859, Samuel Chester, assuming to act on behalf of the company, offered to sell the pieces of land in question to the plaintiff upon certain terms and conditions to be presently mentioned, and by the other of which, dated the 15th November, 1859, the plaintiff accepted the offer. The Master of the Rolls has decreed specific performance of the agreement with costs, and the defendants have appealed from the decree.

The case presents several points of fact and of law for consideration. First, it is said on the part of the defendants that Chester had no authority to enter into this contract, that he was only the traffic manager of the company and not even their general manager, and that he had no special authority from the directors to sell this land, and no general authority to sell any of the company's lands. It is in dispute between the parties whether Chester was the general manager of the company or their traffic manager only; but assuming him to * have been general * 490 manager, I do not think that he can be held, by virtue of that office, to have had authority to enter into this contract. Powers which are given to manage the business of companies must, as I think, be construed to refer to the management of their common and ordinary business, and not to transactions of this nature, which are of an exceptional and special character; and as to authority having been given to him by the directors, there is no proof of any special authority to sell this land or of any general authority to sell any of the company's land having been so given to him. The authority, if it existed, is to be collected only from his acts and proceedings; but the evidence does not satisfy me that even in any single instance he assumed to sell any of the company's land without the authority of the directors. In some of

the instances of sales which are mentioned in the evidence, it is plain that the directors intervened, and in the other instances of such sales it does not appear by the evidence whether they intervened or not, but we cannot, I think, presume that they did not, as it would involve a breach of duty on their part. The strongest evidence on this point is what appears on the cross-examination of Aird. He speaks of the course of business and of Chester having settled the terms of leases to be made by the company, and in some instances, but not, as I understand his evidence, generally, of his having also settled the terms of contracts for sale where land of the company was sold; but it is not shown that in any instance he did so without communication with the directors, and even if he did this in some few instances, it would not, I think, be sufficient to establish a general authority to do so in all cases. The fact which appears in this evidence, that in two or three instances contracts in blank, which were signed by one of the directors, were left in his hands, does not seem to me to carry the case
*491 further. It is not proved to have been so * in more than two or three instances, and it may well be that in those cases the terms of purchase may have been previously settled by Chester with the directors. It does not appear that this was the general course of business, and the mere fact of these contracts having been signed by a director shows that the signature of a director was deemed to be essential to the completion of the contract. So far, therefore, as the case depends on any direct authority having been given by the directors to Chester, my opinion is in favour of the defendants.

But, then, it was said on the part of the plaintiff that the directors ratified this contract, and I think they must be held to have done so. Upon this contract being entered into, the machinery belonging to the plaintiff, which had been deposited on some land on the west of the railway which the plaintiff alleges that he had previously bought from the company, was brought over to the land in question, and there deposited. Other machinery belonging to the plaintiff, which had been landed at the company's harbour, was also brought by the company's wagons to and deposited on this land. The plaintiff was let into possession of the land. The land was measured by an officer of the company. The company laid down lines of rails for the purpose of communication between this land and their main line of railway, and they made borings in the

land. These acts were in conformity with the contract, and they amount, I think, to a representation by the defendants to the plaintiff that the contract was a subsisting and valid contract. It is attempted on the part of the defendants to displace this view of the case, by alleging that the defendants were not aware of this contract until the 5th of December, 1859, before which time these acts had been done, and that immediately on their being
*apprised of the contract they dissented from it, and com- *492
municated their dissent to Chester as the plaintiff's friend, and to Turnbull as his solicitor, and that they allowed the plaintiff's machinery to remain upon the land only for his temporary convenience; but Chester was the manager of the defendants, and Turnbull was their solicitor as much as the solicitor of the plaintiff, and they made no direct communication to the plaintiff. They suffered him to remain in quiet and undisturbed possession, and not only so, but after this 5th December, one of their officers assisted in making a plan for the plaintiff of rolling mills which he intended to erect on the land, and the company's engineer and one of the directors long after this 5th December took part in attempts to find for the plaintiff another site for his works, when it was desired on the part of the company that he should give up the land in question. This course of proceeding does not seem to me to be consistent with what is now alleged on the part of the defendants; but whether so consistent or not, I think that the plaintiff was so far treated as purchaser that he could no longer be treated as a trespasser, as he must have been if there was no valid or binding contract.[1]

The case, however, does not rest here, for it cannot be denied that the acts which I have mentioned above had reference to the contract, and they must, I think, be taken to have been done in part-performance of it. There was not merely a ratification of the contract, but it was in part performed. It was, however, argued for the defendants that these acts of part-performance do not alter the case. It was contended on their part that companies are not bound by acts of part-performance, and that the acts which have been done in this case furnish no equity against the defend-

[1] See 1 Sugden V. & P. (8th Am. ed.) 151, notes (*g*) and (*h*), and cases cited; Wood V. C. in Dale *v.* Hamilton, 5 Hare, 381; Ham *v.* Goodrich, 33 N. H. 45; Ewing *v.* Gordon, 49 N. H. 444, 458; 2 Dart V. & P. (8th Am. ed.) 937; Kerr F. & M. (1st Am. ed.) 135.

ants, because they are acts to the prejudice of the defendants
* 493 only, and not of the plaintiff; but I * cannot accede to either of these arguments. Neither of them is, in my opinion, consistent with the principle on which this Court proceeds in cases of part-performance. The Court proceeds in such cases on the ground of fraud, and I cannot hold that acts which, if done by an individual, would amount to a fraud ought not to be so considered if done by a company, nor can I say that it is no prejudice to the plaintiff to have been permitted to take possession on the faith of an agreement, and afterwards to be held liable to be treated as a trespasser and turned out of possession on the ground that there was no agreement. There is authority for saying that in the eye of this Court it is a fraud to set up the absence of agreement when possession has been given upon the faith of it. Apart, therefore, from any question as to the terms of the agreement, and as to the statutory provisions with respect to contracts with companies, I can see no ground on which a specific performance of this contract could have been refused by the Court.

It was said, indeed, on the part of the defendants, that the company could not sell otherwise than by an agent appointed under their common seal; but the question here is upon a sale by the directors, and it was not disputed that they had authority to sell. Questions, however, are raised upon the terms of the contract, and upon the effect of the statutory provisions with respect to contracts by companies. The letters containing this contract are in these terms: [His Lordship read them.]

It was objected on the part of the defendants that the contract arising upon these letters is not complete and perfect in its terms, and that a Court of Equity, therefore, ought not to enforce a specific performance of it. This argument was rested mainly, if
not wholly, on the 2d article of the proposal contained in
* 494 the letter of * 7th November, 1859, by which it was proposed that the traffic to and from the works should be conveyed upon the terms stated in the agreement of the 8th of August, 1859, and that the other stipulations of that agreement should be fully carried out. It was said that the plaintiff has not proved this agreement of the 8th of August, 1859, and that in the absence of it the agreement sought by this bill to be enforced is incomplete and imperfect, and that a specific performance of it ought not, therefore, to be decreed. I agree in this argument to this extent,

that there is no sufficient proof of the loss of this agreement to let in secondary evidence of its contents, and that the plaintiff's statements of what the contents of it were cannot be received in evidence, the document itself not being proved to be lost; but I cannot go the length of saying that the absence of proof of this document precludes the plaintiff's right to specific performance. Where possession has been given upon the faith of an agreement, it is, I think, the duty of the Court, as far as it is possible to do so, to ascertain the terms of the agreement and to give effect to it. This objection cannot, I think, go further than that it must ultimately be ascertained what the terms of this agreement of the 8th August, 1859, in fact were. It would have been as well, perhaps, that an inquiry should have been directed on this point, and if the parties agree upon it, such an inquiry may be added, but I do not think the addition of the inquiry essential, as the decree for specific performance in fact involves it.

Another objection which was raised on the part of the defendants was, that the specific performance of this agreement would rest in covenant merely, and the case of *Gervais* v. *Edwards* was cited on this point, but the case of *Gervais* v. *Edwards* does not seem to me to apply to this case. In that case the contract was for a * conveyance of land equivalent in value to the *495 loss to be sustained by future damage. What was to be done depended wholly upon a future contingency. In the present case there is no contingency. The plaintiff is to use the defendants' railway. The user of it is necessarily prospective, and could not be secured otherwise than by covenant. The parties, therefore, must have had it in contemplation that it would be so secured, and to hold that under such circumstances specific performance could not be enforced would go far to abrogate this branch of the jurisdiction of the Court, for there is hardly a case of this nature in which agreements are not more or less carried into effect by way of covenant.[1]

There remains, then, the question whether this contract ought to be held binding on the company, having regard to the statutory provisions as to contracts by companies. In this point of view it is material, in the first place, to consider how the question would have stood before the passing of these statutory provisions. It is

[1] See Pain *v.* Coombs, 1 De G. & J. 34.

not disputed that the directors had power, on behalf of the company, to sell the land in question, and having this power, it must, as it seems to me, have been competent to them to ratify a contract made by the manager of the company for the sale of it. They in fact ratified this contract. It became in effect their contract; and even if the case rested here, I see no ground on which, before the passing of the statutory provisions, the Court could have refused specific performance of the contract, much less do I think that a specific performance could have been refused, when the ratification had been followed by possession being given under the contract. The question then is reduced to this, whether the statutory provisions have altered this state of the case. These provisions
* 496 are contained in the 8 & 9 Vict. c. 16, * § 97. The legislature has in this section pointed out modes in which the powers of directors to contract may lawfully be exercised, and has enacted that all contracts made according to those provisions shall be binding and effectual; but it has not said that contracts made in other modes shall not be binding and effectual, where there is power so to make them; and certainly it has not said that any equity which may have existed in this Court before these provisions were introduced shall no longer exist. The Act, it is to be observed, is in the affirmative, and affirmative Acts are not generally to be construed so as to take away pre-existing rights or remedies. Had this been intended, I cannot but think that it would have been expressed. In order to test this question, let it be supposed that in any of these companies express powers were given to the directors to contract in a mode different from that prescribed by the statute, could it be contended that the provisions of the statute precluded them from so contracting? I cannot think that it could. Several authorities were referred to on this part of the case, both on the one side and on the other, in the course of the argument before us; but cases of this description must necessarily depend upon circumstances, and authorities are of but little weight except in so far as principles are to be deduced from them. Looking at the cases which were cited on this point, the weight of authority seems to me to be much in favour of the plaintiff.[1] It was said for the defendants that the cases cited on the part of the plaintiff rested on equities different from that which is insisted upon on

[1] See 1 Dart V. & P. (4th Eng. ed.) 175, 176.

the plaintiff's behalf; but they rested, as I understand them, upon the broad ground of fraud, — that it would be a fraud to permit the defendants to defeat the contract, and that ground in my opinion applies to the present case. The nature and character of the fraud cannot, I * think, alter the case. Upon the whole * 497 case I cannot see my way to alter this decree, and the appeal, therefore, must be dismissed; but as my learned brother does not concur in this opinion, the dismissal will be without costs.

GRAHAM *v.* WICKHAM.

1865. January 27. Before the Lords Justices.

In suits against executors by strangers, it is not the course of the Court to insert in the decree a declaration that the costs of the executors are to be allowed out of the testator's estate, and the omission of such a declaration does not amount to a decision that they ought not to be so allowed.

An order on further consideration having been made in an administration suit containing the usual direction for taxing and paying the costs, and costs, charges, and expenses properly incurred, of the executors, the executors claimed under the head of costs, charges, and expenses the costs incurred by them since the decree in the administration suit in unsuccessfully defending a suit in which a decree had been made against them without saying any thing as to their costs. A motion for a direction to the taxing master to review his certificate disallowing these costs having been refused, on the ground that they had been adjudicated upon in the suit in which they had been incurred: *Held*, on appeal, that the motion ought not to have been disposed of on that ground, but that the question whether the costs were costs, charges, and expenses properly incurred ought to have been entered into.[1]

This was a petition by the executors of James Wickham, the testator in the cause, to discharge two orders of the Master of the Rolls, dated the 25th of July, 1864, and the 5th of December, 1864, by which, in effect, his Honor disallowed the petitioners their costs incurred in two suits of *Rawlins* v. *Wickham* and *Wickham* v. *Bailey*.

The testator, James Wickham, in 1850, carried on business as a banker in copartnership with Charles Bailey. On the 1st of March, 1850, Robert Rawlins joined the firm. In 1854 the busi-

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1233, 1438.

ness was disposed of to the Hampshire Banking Company. It was then discovered that, owing to the frauds of a confidential clerk, the bank was insolvent.

* 498 Upon this discovery being made Rawlins called upon * the testator to indemnify him, on the ground that he had been induced to enter the firm by misrepresentation. The testator denying his liability, Rawlins in May, 1855, commenced an action at law against the testator and Bailey for the misrepresentation. The testator died in October, 1855, leaving a will, by which he appointed his three sons his executors and residuary legatees. After his death the action proceeded against Bailey alone. In the sittings after Trinity Term, 1856, a verdict was found for the plaintiff subject to a reference, directed by order of the 3d of July, 1856. The executors of Mr. Wickham attended before the arbitrator when proceeding with this reference. The arbitrator, on the 5th of December, 1856, awarded that the verdict for the plaintiff should stand with 11,800*l.* damages.

In April, 1856, R. F. Graham, a separate creditor of the testator, instituted a suit for the administration of his estate, and in January, 1857, the usual decree was made.

In February, 1857, Rawlins filed his bill against Wickham's executors and Bailey, praying that the partnership between him and Wickham and Bailey might be declared void, and that the defendants might be decreed to indemnify him against the liabilities of the partnership. Rawlins also carried in a claim in *Graham* v. *Wickham*, which was adjourned till the suit of *Rawlins* v. *Wickham* should be disposed of.

In April, 1857, the executors filed a bill against Bailey and Rawlins to have the property of the partnership duly applied and a receiver appointed. In June, 1857, a receiver was appointed in *Wickham* v. *Bailey* and *Rawlins* v. *Wickham*.

* 499 * On the 4th of May, 1858, the two last-mentioned suits having come on to be heard together a decree was made giving Rawlins the relief prayed by his bill, with costs to be paid by Bailey, and the bill in *Wickham* v. *Bailey* was dismissed and the receiver continued. The executors appealed from the decree, and on the 16th of December, 1858, it was affirmed by the Lords Justices with a slight variation. (*a*) Their Lordships directed the

(*a*) 3 De G. & J. 304.

deposit to be paid to Rawlins, but made no further order as to costs.

On the 5th of May, 1862, a certificate was made in *Rawlins* v. *Wickham* finding the amount due to Rawlins, who was on the strength of this certificate admitted as a creditor for that amount in *Graham* v. *Wickham*. The executors had contested the case in Chambers under the decree in *Rawlins* v. *Wickham*, and had succeeded in striking off 2000*l*. from the amount claimed.

By the order on further consideration in *Graham* v. *Wickham*, on the 5th of December, 1852, it was ordered that it should be referred to the taxing master to tax the plaintiffs and defendants, including the late defendant James Wickham (one of the executors), their costs of the suit, the costs of the defendants as between solicitor and client; the costs of the executors to include any costs, charges, and expenses properly incurred by them as executors and trustees of the testator not being costs in the cause. And it was ordered that the separate creditors of the testator should be paid their debts out of his separate estate, and that the balance of that estate after payment of costs should be apportioned amongst the joint creditors of the testator, the amount due to Rawlins being included among such joint debts.

* On taxation the executors sought to be allowed the costs * 500 which they had incurred and paid in *Rawlins* v. *Wickham* and *Wickham* v. *Bailey*, as being costs, charges, and expenses properly incurred by them as executors. The taxing master disallowed the claim. The taxing master, after stating the circumstances, gave his reasons as follows: —

"The question, under this state of circumstances, raised by the objection to my certificate of taxation is,—

"Whether Wickham's executors are entitled, under the head of charges and expenses properly incurred as executors and trustees, to have allowed to them the costs of the two suits *Rawlins* v. *Wickham* and *Wickham* v. *Bailey*.

"I have come to the conclusion that they are not such costs as were intended by the Court under this direction in the order,— that they are not costs incurred by them as executors and trustees in discharge of their fiduciary duty, which ought to be paid out of the trust estate, but that they are the costs of personal litigation for their own personal interests, and that the costs of this litigation

have been already adjudicated upon by the Court before whom the causes were heard."

The executors moved before the Master of the Rolls that it might be referred back to the taxing master to review his certificate, so far as regarded the disallowance of the above costs. On the 25th of July, 1864, his Honor refused the motion with costs, on the ground that as the decrees in *Rawlins* v. *Wickham* and *Wickham* v. *Bailey* contained no declarations that they were to be allowed, they could not now be allowed.

By an order dated the 4th of August, 1864, the sum of 600*l.* * 501 was directed to be carried to a separate account, * intituled "The Costs Account," the remainder of the estate to be distributed as directed by the order on further consideration. The executors subsequently received 150*l.* from the outstanding estate of the testator.

In November, 1864, the executors presented their petition in *Graham* v. *Wickham*, praying that their costs in *Rawlins* v. *Wickham* and *Wickham* v. *Bailey* might be taxed as between solicitor and client, that they might be allowed to retain the 150*l.* in part payment, and that the residue of their costs might be paid out of the 600*l.* reserved.

The Master of the Rolls, on the 5th of December, 1864, dismissed the petition with costs, and the executors thereupon presented their petition of appeal, stating to the effect of the above statements, and praying that the orders of 25th July, 1864, and 5th December, 1864, might be discharged; that the petitioners might have the relief asked by their notice of motion, and by their petition at the Rolls, and that the costs of the motion which they had paid might be refunded.

Mr. Hobhouse and *Mr. G. Lake Russell*, for the appellants.—The first question is, whether the taxing master had jurisdiction to enter into the question whether these were costs, charges, and expenses properly incurred. We submit that he had. It is certainly the practice for him to entertain such a question, and, if he had jurisdiction, the order of the Master of the Rolls refusing the motion cannot be supported. At all events the Court had jurisdiction on the petition, and the case must be decided on the * 502 merits. It was necessary to defend the * suit of *Rawlins*

v. *Wickham*, and the result was not wholly unfavourable, the demand of Rawlins having been considerably reduced. The suit of *Wickham* v. *Bailey* was necessary to protect the partnership assets. The executors ought, therefore, to be allowed their costs. Any direction as to them in the suits in which they were incurred would have been out of place: a declaration in those suits that the executors were to be entitled to them as against their testator's estate would have been an attempt to bind parties not before the Court. *Payne* v. *Little* (*a*) cannot be supported.

Re Clark, (*b*) *Bristowe* v. *Needham*, (*c*) and Seton's Decrees, (*d*) were referred to.

Mr. Hinde Palmer and *Mr. Lewin*, for Rawlins. — The order refusing the motion was right, the taxing master having no authority, under the common order, to tax these as costs, charges, and expenses properly incurred. *Payne* v. *Little* (*a*) is express on this point. It is the practice to provide expressly for the costs incurred in another suit if it is intended that they should be paid. Then, as to the merits: The executors did not contest Rawlins's claim for the benefit of other creditors: there was amply sufficient to pay the separate creditors. The executors, being residuary legatees, defended the suit of *Rawlins* v. *Wickham* for their own benefit. They did so without obtaining the sanction of the Court in *Graham* v. *Wickham*. The proceedings at law showed that the defence had no fair prospect of success. They must be taken, therefore, to have defended the suit on account of their own beneficial interests, and at their own risk; and this being so,

* they, having failed, must bear the costs of that suit. If * 503 not, the result is that Rawlins pays the whole costs of his successful suit; for every thing paid out of the estate of Mr. Wickham, whose estate is insufficient to pay him, comes out of his pocket.

[The Lord Justice Turner. — Was not the suit of *Rawlins* v. *Wickham* necessary in order to ascertain the amount of Rawlins's demand ?]

(*a*) 27 Beav. 83.
(*b*) 1 De G., M. & G. 43.
(*c*) 2 Phill. 190.
(*d*) Vol. 2, p. 767 (3d ed.).

We submit, that, if the liability had not been disputed, the account might have been taken in the administration suit; but if not, at all events the costs of *Rawlins* v. *Wickham* would have been insignificant, if the question of liability had not been raised. Then as to the suit of *Wickham* v. *Bailey*, it was useless and unsuccessful, and was instituted without any reasonable ground. The only substantial relief sought was the appointment of a receiver, all other relief having been abandoned, and a receiver could have been appointed in *Rawlins* v. *Wickham* without a suit for the purpose.

Mr. Hobhouse, in reply. — The result of the proceedings at law was not decisive as to the result here, for Bailey was in a very different position from Wickham, as was stated by the Court in the appeal in *Rawlins* v. *Wickham*.

THE LORD JUSTICE TURNER. — This case involves points both of form and of merits. It came before the Master of the Rolls, in the first instance, on an application for a direction to the taxing master to review his taxation of the costs which had been directed to be taxed in the suit of *Graham* v. *Wickham*, which was a common administration suit, instituted by a creditor against the executors of Mr. Wickham for an account of his estate. By the
*504 order on *further consideration in that suit, a direction was given to tax the executors their costs, including any costs, charges, and expenses properly incurred by them, not being costs of suit. Under this order a claim was made by the executors to be allowed the costs incurred by them in defending a suit instituted against them by Mr. Rawlins, and in a suit instituted by themselves against Mr. Bailey, for the purpose of having a receiver appointed of the estate of the partnership in which Mr. Wickham, their testator, had been engaged. The taxing master, upon considering that claim, came to this conculsion: [His Lordship here read the reasons of the taxing master as set out above.]

I cannot agree with these reasons so far as they are founded on the proposition that the costs in *Rawlins* v. *Wickham* and *Wickham* v. *Bailey* had been adjudicated upon by the Courts which heard those causes. I do not apprehend that the Vice-Chancellor's making a decree in *Rawlins* v. *Wickham* without costs, nor our dismissal of the appeal from that decree, involved any decision that the costs incurred by the executors in that litigation were not

ultimately to be allowed them out of the estate. According to my view of the practice, it is not the course of the Court, in suits by strangers against executors, to declare in the decree made against the executors that they are to be entitled to costs out of their testator's estate. I think such is not the course of the Court for this reason, that the persons affected by such a declaration are not before the Court in the suit in which the decree is made, and that an order prejudicially affecting their interests ought not to be made in their absence. The Master of the Rolls, when the motion came before him, appears to have disposed of it upon the ground that he had no jurisdiction to entertain the application, his Honor being of opinion that if *the Courts which heard the causes, *505 the costs in which are in question, had considered that the costs incurred by the executors in them should be allowed against the estate, this ought to have been expressed in the decrees, and that, as it was not so expressed, they could not now be allowed. With deference to the Master of the Rolls, I cannot agree in this conclusion, which does not seem to me conformable to the course of the Court, nor to justice, in cases of this description. There may be many cases in which, though executors fail in their defence of a suit, it may be right to allow them their costs out of the estate, and I think that it is quite within the power of the Court to allow them. I am of opinion, therefore, that the Master of the Rolls might well have considered the motion upon the merits. One difficulty which occurred to me was, whether the costs which form the subject of the present appeal should not have been brought in under the head of just allowances. In many cases there is no doubt that executors may be entitled to the costs of proceedings under that head, for instance, where there has been an action in which the executor has incurred costs before the suit in this Court, as in *Fearns* v. *Young*. (*a*) But it does not follow, that, because the expenses of proceedings which have taken place before the suit in this Court may be brought in as just allowances, the expenses of legal proceedings may in all cases be so brought in. In this case I think they ought not, for the expenses incurred in *Rawlins* v. *Wickham* were incurred subsequently to the decree in *Graham* v. *Wickham*.

After the Master of the Rolls had refused the motion to review

(*a*) 10 Ves. 184.

the decision of the taxing master, the executors applied by
* 506 petition to have the costs in question *allowed. The suit of *Graham* v. *Wickham* was not then wound up. The Master of the Rolls dismissed the petition with costs, on the ground that granting the prayer of it would be in effect an alteration of the order on further consideration. I think that an order might have been made upon it without in any degree interfering with the order on further consideration, for a sum of 600*l.* had been reserved to meet costs, and there were further assets to come in which might be dealt with under the liberty to apply. I am of opinion, therefore, that if such an order would have been right upon the merits, there was nothing in point of form to prevent its being made.

The real question before us is, whether on the merits these executors were entitled to the costs of defending the suit of *Rawlins* v. *Wickham* and instituting and prosecuting the suit of *Wickham* v. *Bailey*. I will first consider the latter suit. Before that suit was instituted Mr. Rawlins had filed a bill seeking to have it declared that no partnership between him and Mr. Wickham and Bailey had ever existed, and praying for a receiver of the partnership assets. This bill was filed on the 27th of February, 1857, and was filed against the executors of Mr. Wickham as well as other parties. In April, 1857, the executors filed their bill in *Wickham* v. *Bailey* to have the accounts of the partnership taken and a receiver appointed. It is clear that the appointment of a receiver was the only substantial relief sought by the filing of that bill, for when the cause came on to be heard the executors did not ask to have the account taken and submitted to the dismissal of their bill. In these circumstances, I think it was their duty as executors before filing that bill, as they were defendants in *Rawlins* v. *Wickham*, to have applied to Mr. Rawlins and stated to him
* 507 that if he would apply for the appointment of a * receiver they would consent to the application. I think that when there was a suit existing in which a receiver might have been appointed they ought not to have incurred the expense of a separate suit for the purpose of having one appointed, without first trying to save that expense by getting a receiver appointed in the existing suit. I think that the bill in *Wickham* v. *Bailey* was unadvisedly filed, and that the executors are not entitled to have their costs of that suit out of the estate.

With respect to the suit of *Rawlins* v. *Wickham*, the case seems to me to stand on a somewhat different footing. Mr. Rawlins made a large claim against the estate of Mr. Wickham to the amount of about 13,000*l*. The claim involved a question of liability and a question of account. As to the question of liability, an action had been brought by Mr. Rawlins against Mr. Wickham and Bailey, in the lifetime of the former, on the ground of the misrepresentation which formed his title to relief in *Rawlins* v. *Wickham*. Mr. Wickham had died before trial, the action had gone on against Bailey, a verdict had been obtained against him subject to a reference to ascertain the amount due from him to Mr. Rawlins. The executors appear to have attended before the arbitrator when he investigated this question; and I think that the executors, knowing of this judgment at law, and knowing that the suit of *Graham* v. *Wickham* was pending, were not justified in defending the suit of *Rawlins* v. *Wickham*, without at first applying to the Court in *Graham* v. *Wickham* for directions as to whether they should defend it or not. I think that if they had been acting merely in their fiduciary character, and without reference to their own personal interests as residuary legatees, they would have applied for directions before defending the suit.
They did not do so, but * defended the suit, denying all * 508
liability to the claim of Mr. Rawlins. So far, therefore, as
that suit had reference to liability the executors were, in my opinion, wrong in defending it, and ought not to be allowed their costs. On the other hand, in *Graham* v. *Wickham* a claim had been carried in by Mr. Rawlins, which was adjourned until a decision should be given in *Rawlins* v. *Wickham*. This shows, and the nature of the case itself shows, that it was necessary, in order to ascertain what was due to Mr. Rawlins, that inquiry should be made by the Court on the subject. I think, therefore, that the executors ought to be allowed their costs of taking the accounts directed in *Rawlins* v. *Wickham*, but not any other costs of that suit.

I think our order ought to be to discharge the orders of the Master of the Rolls on the motion and petition, and declare that the executors are entitled to be allowed their costs of the accounts directed in *Rawlins* v. *Wickham* out of the 600*l*. and the assets subsequently received, with a direction for taxation and payment of those costs.

THE LORD JUSTICE KNIGHT BRUCE. — With deference to the Master of the Rolls, I also think that his Honor was not precluded by any course of procedure or rule of the Court from entering into the merits of this case on one, at least, of the applications before him. On the merits it seems to me that so far as the Lord Justice has dissented from the taxing master and the Master of the Rolls his Lordship is right. I am rather disposed to think that there is enough in the merits to warrant our doing more on this appeal; but, as the Lord Justice is not of that opinion, nothing more than what he has said can be done. So far as he dissents from
* 509 what has been done I agree with him, not * giving any concluded opinion as to whether our order ought to go further.

Mr. Hobhouse asked for leave to add the costs of the motion, the petition, and the present appeal, to the other costs of the executors in *Graham* v. *Wickham*.

THE LORD JUSTICE TURNER. — We think that you ought to have leave to add your costs of the motion to your other costs. We think you cannot have any costs of the petition, for, instead of presenting it, you ought to have come here on appeal from the refusal of the motion. We do not think that you ought to have any costs of the appeal.

Re FORSYTH, a Solicitor.

1865. June 29, 30. Before the LORDS JUSTICES.

The jurisdiction of the Court over solicitors, as officers of the Court, for misconduct, is very special, and will not be exercised on an ordinary summons for taxation of a bill of costs.

On the occasion of the transfer of the securities of first and second mortgagees to a third mortgagee, a sum of money was paid to the solicitor acting on behalf of the first and second mortgagees and the mortgagor on account of his costs, and was added to the mortgage debt. Afterwards he sent in his bill of costs to the third mortgagee, which included charges for business done for the mortgagor, and also for business done for the mortgagees in a common-law Court. The third mortgagee took out a summons for taxation of the bill: *Held*, that he could have no relief upon that application either under the Solicitors' Act, or under the general jurisdiction of the Court.

By indentures dated the 19th July, 1851, and the 19th December, 1862, certain hereditaments known as Colethall House, at Hornsey, in the county of Middlesex, were mortgaged by Benjamin W. Jackson to William Hall and Walter Armstrong for securing 3000*l.* By two subsequent indentures dated the 8th January, 1863, *and the 7th January, 1864, B. W. Jackson created *510 a second mortgage to Richard Twyford King and William Tomkinson Riley for 570*l.*; and by an indenture dated the 19th May, 1864, he mortgaged the same property to George Wright Greenwood for 500*l.*, subject to the two previous mortgages.

The property was advertised for sale on the 17th June, 1864, by Messrs. Debenham & Tewson, auctioneers. This was done by the direction of Mr. Alexander Forsyth, who was at that time acting as the solicitor of the first and second mortgagees, although he had previously also acted as the solicitor of B. W. Jackson, the mortgagor.

In order to stop the sale Greenwood offered to redeem the first and second mortgagees, and accordingly, on the 14th June, he called on Forsyth, in company with Mr. Charles Cowland, who had agreed to advance the money. The principal and interest then due to the first and second mortgagees was calculated at 3874*l.* 8*s.* 4*d.*; but Forsyth informed Greenwood that a sum of costs, amounting to about 500*l.*, was due to him as the solicitor of the mortgagees, and he refused to give up the title-deeds until that was satisfied. After some discussion, it was agreed that Greenwood should pay the sum of 425*l.* 11*s.* 8*d.* on account of those costs, so as to make the round sum of 4300*l.*, and that Forsyth should make out and send to Greenwood his bill of costs and settle the correct account with him. The money was accordingly paid, and Forsyth signed the following receipt: —

"Received this 14th day of June, 1864, of Mr. G. W. Greenwood the sum of 3264*l.* 8*s.* 4*d.*, being the principal sum of 3000*l.* due to Messrs. Hall & Armstrong as first mortgagees of Colethall House and interest thereon up to this day after deducting income tax; *and also the sum of 610*l.*, being the amount *511 of the claim of Messrs. King & Riley as second mortgagees of Colethall House; and also the sum of 425*l.* 11*s.* 8*d.* in respect of the costs and expenses incurred in reference to the business, the accounts thereof to be hereafter adjusted. The said first and

second mortgagees to transfer their respective mortgages to the said Mr. Greenwood on being required to do so, at his expense.

" (Signed.) ALEXANDER FORSYTH."

By an indenture dated the 14th June, 1864, the first and second mortgagees transferred their securities to Greenwood, who on the following day assigned them to Cowland in consideration of 4300*l.* advanced by him.

Subsequently Forsyth sent in his bill of costs, amounting to 506*l.* 8*s.* 4*d.*, being 80*l.* 16*s.* 8*d.* more than the sum paid to him on the occasion of the transfer. But Greenwood complained that the sum included charges for business done for Mr. Jackson the mortgagor, by Forsyth, and also by Messrs. Debenham & Tewson, which could not be properly charged to the mortgagees. The bill contained no items for business done in Chancery, but there were some small items for receiving instructions for and suing out a writ of ejectment in the Court of Common Pleas in January, 1864.

Greenwood accordingly took out a summons in the Chambers of the Master of the Rolls in the following form: " To tax and settle the bill of costs of the said Alexander Forsyth, and to take the account of the costs and expenses incurred in reference to a transfer of the mortgage on Colethall House, with the usual directions; and if it shall appear that the bill and accounts are overpaid, then that the said Alexander Forsyth shall refund and pay what
* 512 the taxing master shall certify * to have been so overpaid."

The summons contained no further specification of the bill or the accounts referred to.

The Master of the Rolls adjourned the matter into Court, and on the 12th January, 1865, being of opinion that the application, although in form to tax the bill of costs, was in reality to reform the mortgage-deed, refused the application, but without costs. From this claim Mr. Greenwood appealed.

An objection was made at the outset that Greenwood had no interest, he having assigned his securities to Cowland; but it was agreed that the case should be argued as though Cowland had joined in the summons.

Mr. Jessel, for the appellant. — There was no agreement that Greenwood should pay the mortgagor's costs, but only those of the

first and second mortgagees. The bill of costs professes to be for business done for the mortgagees, and the charges of which we complain are inserted among the others.

Independently of the Solicitors' Act, the Court has a general jurisdiction over solicitors, as officers of the Court. In this case Forsyth has been overpaid and has agreed to account; and the Court will oblige him to do so. *Re* ———, (*a*) *Re Aitkin*, (*b*) *Re Foljambe*, (*c*) *Re Laurence*. (*d*)

Mr. Hobhouse, for Forsyth. — This is not a bill which is liable to taxation in Chancery. There are no items for business done in Chancery, but there are some for business done in a Common-Law * Court. And the fact that the action to which *513 these items related did not come to an issue makes no difference. *Winter* v. *Payne*, (*e*) *Wilson* v. *Gutteridge*, (*g*) *Weld* v. *Crawford*, (*h*) *Re Gaitskell*. (*i*)

The Court has no general jurisdiction in such a case as this. There was no fraud or misconduct on the part of the solicitor, nor any detention of documents on which to found a claim for the interference of the Court. This ground of relief was a mere afterthought. The application was made under the Solicitors' Act as a common summons for taxation, and was so entitled.

Mr. Jessel, in reply.

The Lord Justice Knight Bruce. — Mr. Greenwood, the appellant in this case, may possibly be entitled to relief in equity by bill, or to a remedy by action at law against Mr. Forsyth, in respect of the costs and account in question. On his right to apply by bill or action I abstain from giving any opinion. He may or may not have such right. The question now before us is, whether without any suit Mr. Greenwood is entitled to an order to tax this bill of costs and for an account. My opinion is, that neither according to the course of procedure and practice of this Court, nor on the evidence, is Mr. Greenwood so entitled. The Court has differed from time to time as to the circumstances under which a solicitor may

(*a*) 4 L. J. (O. S.) Ch. 207.
(*b*) 4 B. & Ald. 49.
(*c*) 9 Beav. 402.
(*d*) 2 Sm. & Giff. 367.
(*e*) 6 T. R. 645.
(*g*) 3 B. & C. 157.
(*h*) 2 Stark. 538.
(*i*) 1 Phil. 576.

be subject to a summary application without a suit. The Courts have formerly gone to lengths to which, I apprehend, they would not go now. But I consider that the mere circumstance
* 514 * that a solicitor is accountable to a client on a money account is not sufficient. There must be possession of documents or some other circumstances giving a jurisdiction. In this case there was no right to tax the bill of costs in the Court of Chancery; if there was any right to tax the bill it would only have been in a Court of Common Law. Neither in precedent nor in fact was there any title to obtain an order against Mr. Forsyth under this application. I am, therefore, of opinion that the Master of the Rolls rightly disposed of this case; but if the application was not refused without prejudice to a bill or an action, we will make the order without prejudice to any such proceeding on the part of Mr. Greenwood.

THE LORD JUSTICE TURNER. — I am also of opinion that the order of the Master of the Rolls is right. I observe, with considerable regret, the extreme looseness of practice under the Solicitors' Act. Here is a summons, "to tax the bill of costs of Mr. Forsyth, and take the account of the costs and expenses incurred in reference to the mortgage," without any specification of what bill of costs was sought to be taxed, or any statement that any bill of costs had been delivered. It is said that this is a question of form and not of substance. In my opinion it is a matter of substance. It is essential that the Court should know what the bill is which is to be taxed.

In this particular case, although the application is made in the matter of the Act, *Mr. Jessel* seeks to rest his case on the general jurisdiction of the Court over solicitors. I do not think he has a right to do so. The jurisdiction of the Court as to solicitors is very special: to correct the conduct of an officer of the
* 515 Court, it ought not to * be raised on a mere summons; there must be a special application in Court. In this case there was a specific agreement between the parties, and the Court is asked to undo it and to make an order as if there had been no such agreement. That is a matter for a special application. Without entering into the merits of the case, it does appear to me that if there is any ground for relief against Mr. Forsyth, either under the general jurisdiction of the Court, or under the

Act, it must be sought by a special application, and that this summons was properly discharged, but that it should be discharged with costs. The order will be made without prejudice to any proceedings at law or in equity which Mr. Greenwood may be advised to institute.

Re DUMMER'S WILL; *Re* The LANDS CLAUSES CONSOLIDATION ACT, 1845; *Re* The EAST KENT RAILWAY ACT, 1853.

1865. June 30. Before the LORDS JUSTICES.

Where a piece of land had been taken by a railway company, and the purchase-money paid into Court under the Lands Clauses Act, the Court allowed the money to be laid out in building cottages on another part of the estate which was lying waste and unproductive; but in such a case no part of the money will be paid out till the buildings are completed.[1]

THIS was an application under the 69th section of the Lands Clauses Consolidation Act for the reinvestment of a sum of 1562*l.* 8*s.* 4*d.* consols, the produce of lands taken by the East Kent Railway Company, in the erection of cottages on another portion of the land settled to the same uses.

The estate of which the land in question formed part was called the Grove, and was situated at Chatham in the county of Kent. It was devised by the will of John Dummer, dated the 13th March, 1839, to trustees in trust for the petitioner Jane Ann Lester, the wife of * the petitioner Charles Lester, during his life, *516 and after her decease to be equally divided between all the children of the said Jane Ann Lester in equal shares as tenants in common, and in default of such issue upon the trusts therein mentioned.

The testator died on the 30th April, 1839.

Mrs. Lester had two children, who were both under age.

In the year 1836 certain pieces of land containing 1a. 3r. 29p., being part of the land settled, were purchased by the East Kent Railway Company for 1455*l.*, which was accordingly paid into Court and invested, producing the sum of 1562*l.* 8*s.* 4*d.* consols.

[1] See *In re* Leigh's Estate, L. R. 6 Ch. Ap. 887.

The piece of land on which it was proposed to build the cottages was at present lying waste and unproductive, and was considered to be eligible for building cottages, as it was near the town of Chatham and in the immediate vicinage of the Royal Dock Yard. Mrs. Lester had already three small houses adjoining the piece of land, which were let for 10*l.* a year, and three others let at 8*l.* a year. Estimates had been prepared by an experienced architect for the erection of nine cottages, which it was calculated would produce a clear rental of 90*l.* a year, and which a respectable builder was willing to build for 1300*l.* The Master of the Rolls, before whom the petition was presented, doubted whether he had jurisdiction to make the order, considering that the 69th section of the Lands Clauses Consolidation Act (*a*) gave no power to reinvest purchase-money in the building of houses, and desired that the application should be renewed before the Lords Justices.

* 517 * *Mr. Cory* appeared for the petitioners, and cited *Ex parte Shaw* (*b*) and *Re Partington.* (*c*)

The Lord Justice TURNER said that he remembered a decision of Lord ELDON, not reported, in a case in which, on the occasion of the construction of the New Kent Road, under an Act of Parliament, the vicarage house of Camberwell had been cut through, and half the kitchen was left standing and exposed. Lord ELDON, after considerable doubt, directed that part of the purchase-money paid into Court, which under the Act should have been laid out in the purchase of land, should be applied to the restoration of the vicarage.[1]

Mr. J. T. Humphry (*amicus Curiæ*) referred to *Re The Incumbent of Whitfield,* (*d*) and *Re The Buckinghamshire Railway Company.* (*e*)

THE LORD JUSTICE KNIGHT BRUCE. — I think that the case is one of much doubt. The Court has sometimes acceded to such

(*a*) 8 & 9 Vict. c. 18. (*b*) 4 Y. & C. 506.
(*c*) 7 L. T. (N. S.) 522; 11 W. R. 160.
(*d*) 1 John. & H. 610.
(*e*) 14 Jur. 1065; see also *Re* Wight, 6 W. R. 718; *Re* Davis, ib. 844.
[1] See *In re* Lord Hotham's Trusts, L. R. 12 Eq. 76.

applications, and has sometimes refused. I should think it would be better that the case should be mentioned to the Lord Chancellor; however, if my learned brother thinks that the order may be properly made, I have no objection to agree to it.

THE LORD JUSTICE TURNER. — I think that it may be done in this case. But the order will be that no part of the money shall be paid out of Court until the production of a certificate of the architect that the whole of the buildings are completed.

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* REDE *v.* OAKES. * 518

1865. February 17. Before the LORDS JUSTICES.

A bill by a vendor for specific performance being dismissed, and the purchaser not wishing for an order for return of the deposit, unless it was ordered to be returned with interest: *Held*, by the Lord Justice KNIGHT BRUCE, the Lord Justice TURNER giving no opinion, that the Court ought not to order a return of the deposit, but to leave the purchaser to his remedy at law.

IN this case a decree for specific performance of a contract for the sale of an estate had been made by the Master of the Rolls at the suit of the vendor. On appeal the Lords Justices reversed the decree and dismissed the bill without costs. (*a*) The appeal was now put into the paper to be spoken to on the question whether the order made on the vendors to return to the purchaser the deposit which he had paid on entering into the contract should order it to be repaid with interest.

Mr. Selwyn and *Mr. Humphry*, for the defendant, asked that interest might be given on the deposit, or that the direction to return it might be omitted from the order, leaving the defendant to his remedy at law. They referred to *Lord Anson* v. *Hodges*, (*b*) *Webb* v. *Kirby*. (*c*)

Mr. Baggallay and *Mr. F. J. Turner*, for the plaintiffs.

(*a*) To be reported *infra*.
(*b*) 5 Sim. 227.
(*c*) 7 De G., M. & G. 376.

THE LORD JUSTICE KNIGHT BRUCE. — My opinion is that we ought not to make any order as to the deposit, but merely express that our order is to be without prejudice to any proceedings which the defendant may take for its recovery with interest.

THE LORD JUSTICE TURNER. — As the opinion of my learned brother disposes of the case, I give no opinion upon it.

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* 519 * In the Matter of S. TOWNSHEND, a Lunatic.

1865. March 17. Before the LORDS JUSTICES.

A medical gentleman, in whose care a lunatic had been placed, presented a petition during her life for payment out of her estate of the balance claimed to be due to him for her maintenance: *Held*, that an order for that purpose could not be made on his application, but the committee appearing and asking for an inquiry what was due to the petitioner, such inquiry was directed.

IN the year 1855, the lunatic was placed by her mother under the care of the petitioner, who was a doctor of medicine, the mother agreeing to pay him for the maintenance of the lunatic 300*l.* per annum. Soon afterwards, by the direction of the mother, proceedings in lunacy were taken, and the daughter was in the same year declared lunatic, and committees of the person and estate were appointed. The lunatic had a fortune of about 280*l.* a year, and the whole of it was by an order in lunacy directed to be applied for her maintenance, the mother undertaking to make it up to 300*l.* a year. The lunatic continued to reside with the petitioner. The mother died in 1858. In March, 1860, new committees both of the person and estate were appointed, and immediately afterwards the petitioner, in compliance with directions received from them, brought the lunatic to London, and delivered her into their charge.

The petitioner alleged a balance of 338*l.* to be due to him for the maintenance of the lunatic, and for expenses incurred in relation to her, including the bringing her up to London, after allowing for all sums which he had received from the committees for the time being.

The petitioner prayed that he might be declared a creditor on the estate of the lunatic for the 338*l.*, and that this sum and the petitioner's costs might be raised out of the estate of the lunatic.

Mr. Crossley, for the petitioner, having stated the case, —

* The Lord Justice TURNER asked whether there was any * 520 precedent for such a petition, the usual course being for the claims of persons with whom lunatics had been placed to be settled between them and the committee.

Mr. Crossley submitted, that the best course would be for the amount of the petitioner's claim to be settled in the lunacy, as otherwise he would be put to bring his action against the committee, by which additional costs would be occasioned.

THE LORD JUSTICE KNIGHT BRUCE. — I do not think that an order for ascertaining the amount of the petitioner's claim, and paying it out of the estate, can be made on his application. It would, however, be advantageous to avoid the necessity for an action, and if the committee who appears on this petition will by his counsel apply for such an order, I think that we may make it.

THE LORD JUSTICE TURNER. — I am of the same opinion. It ought, I think, to be expressed in the order that it is made on the application of the committee.

Mr. Bagshawe, for the committee, having stated that he was authorized to make such an application, and *Mr. Wickens*, who appeared for the Crown, not opposing, an order was made to this effect: The committee appearing on the petition and asking for an account of what is due to the petitioner, let the Master inquire whether any thing and what is justly due to the petitioner from the estate of the lunatic. The rest of the petition to stand over.

* 521 * In the Matter of The LITTLEHAMPTON, HAVRE, AND HONFLEUR STEAMSHIP COMPANY LIMITED; In the Matter of The COMPANIES ACT, 1862.

1865. February 17. Before the LORDS JUSTICES.

The transferee of scrip certificates transferable by delivery, which entitled the holder to become a shareholder in respect of the shares therein mentioned, and in the mean time to receive dividends, petitioned for the winding-up of the company: *Held*, by the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls (the Lord Justice TURNER dissenting), that the petitioner admitting himself to be a contributory and undertaking to do all acts necessary to make himself a shareholder, a winding-up order might be made on his petition.

THIS was an appeal by the company from a winding-up order made by the Master of the Rolls.

The company was registered in 1863 as a company with limited liability, with a capital of 150,000*l.* in 15,000 shares, and the articles of association contained the following provisions: —

"4. Any person having signed an application for shares in such form as the directors may determine shall be deemed to have agreed to become a member of the company.

"8. The directors may, instead of entering the name of the applicant or allottee on the register of members, issue to him, on such terms and conditions as they may think fit, a provisional scrip certificate under the common seal of the company, entitling the holder thereof to the share or shares therein named, subject to the payment of the several instalments and at the several times mentioned in such provisional scrip certificate.

"11. So soon as all instalments shall have been paid on any provisional scrip certificate, the company may issue in exchange for the same a full scrip certificate declaring the holder thereof to be the possessor of the fully paid-up shares therein named.

* 522 * "12. The company shall keep a register, to be called the scrip register, in which shall be entered the numbers of all shares for which scrip certificates have been issued, and the numbers of the corresponding scrip certificates.

"13. The holder of any provisional or full scrip certificate for

the time being in force shall on surrendering his scrip certificate, accompanied with a request in writing to that effect signed by such holder, be entitled to be entered on the register of members in respect of the shares in such scrip certificate mentioned, and such shares shall thereupon be removed from the scrip register and entered in the register of members in the name of the person so making such request.

"21. All shares in the company for which provisional or full scrip certificates have been issued shall be transferred by the simple delivery of such scrip certificate, and the holder of any such scrip certificate shall be the only person recognized by the company as having any right or title to the shares therein named.

"22. All shares for the time being entered on the register in the name of any member shall be transferred by instrument of transfer in such form as may from time to time be in use on the London Stock Exchange.

"23. The instrument of transfer of any share shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof."

The holders of scrip certificates were entitled to receive dividends, and were liable to forfeiture for non-payment of calls.

Mr. Ellis, the petitioner for the winding-up order, * had * 523 never applied to the company for shares, but had become the holder of provisional scrip certificates originally granted to another person for ten shares, on which 2*l.* per share had been paid. The form was as follows:—

"Littlehampton, Havre, and Honfleur Steamship Company Limited.

"First issue 7500 shares of 10*l.* each.

"Nos. 6743 to 6747.

"The holder hereof is entitled to five shares numbered as above in the capital of the company, subject to the rules and regulations of the company, and to the payment of such instalments as may be from time to time notified by advertisement in the Times newspaper."

A resolution had been passed for a voluntary winding-up of the company, and Mr. Ellis presented a petition for a compulsory

winding-up, admitting himself to be a contributory and undertaking to do all acts necessary to make himself a complete shareholder. The merits of the case need not be stated, the only point deserving a report being the question whether the petitioner had any *locus standi*. The Master of the Rolls made an order for winding-up, from which the company now appealed.

Mr. Selwyn and *Mr. Jones Bateman*, for the company, in support of the appeal. — The petitioner is not a contributory, and has no *locus standi*. The right of the petitioner to come here depends on the 82d section of the Companies Act of 1862 coupled with the definition of a contributory given by section 74. The definition in the Winding-up Act of 1848 was wider, and included a person entitled to share in the assets; but that in the Act of 1862 is confined to a person liable to contribute to debts. The petitioner is not liable; he has signed no agreement to take shares; * 524 he holds papers which entitle him to become a shareholder * if he pleases, but do not entitle the company to compel him to become one. As between the company and a transferee of scrip the latter is not a shareholder: *Newry and Enniskillen Railway Company* v. *Edmunds*; (*a*) neither is he, as between himself and the transferor, bound to take the shares. *Jackson* v. *Cocker*. (*b*) An allottee cannot get rid of his liability unless he gets some other person duly constituted holder of the shares.

Mr. Baggallay and *Mr. Roberts*, for Mr. Ellis. — The holders of scrip certificates, having the same benefits as shareholders, must take the burdens. There is a practical difficulty, it is true, in making out the list of contributories on that footing, but it must be grappled with. The Court will ascertain, as well as it can, who were the holders of scrip at the time when the winding-up order was made, and they will be contributories, transfers after that time being held void. In *Hyam's Case* (*c*) it is clear from the language of the Judges, that if the transfer had been *bonâ fide* the decision would have been according to our contention.

Mr. Selwyn, in reply.

(*a*) 2 Exch. 118.
(*b*) 4 Beav. 59. See also Humby's Case, 5 Jur. (N. S.), 215, V. C. K.
(*c*) 1 De G., F. & J. 75.

THE LORD JUSTICE KNIGHT BRUCE. — The title of the present petitioner was and is formally so incomplete as not to give him an absolute right to obtain an order from the Court for winding up the company. At the same time, he had and has, as it appears to me, so substantial an interest in the company as to make it not incumbent on the Court to dismiss the petition, but to leave the Court at liberty to give him relief, * on his undertaking, * 525 as he has undertaken, to submit to be a contributory. The question what ought to be done on this petition is very much one for judicial discretion, and in the circumstances of this case there would, as it appears to me, be so much danger of irregularity and want of efficient supervision under a voluntary winding up, that I cannot but consider the Master of the Rolls to have taken a judicious course in ordering a winding-up on the petition, notwithstanding the defects in the petitioner's title. I think that to accede to the application before us would do more harm than good, and would probably stand in the way of substantial justice.

THE LORD JUSTICE TURNER. — The united opinions of my learned brother and the Master of the Rolls are more likely to be right than mine, but I cannot see my way to holding that the petitioner is a contributory entitled to present a petition for winding up the company. It seems to me that on the true construction of the articles he is not a contributory within the meaning of the Act. According to the 8th clause of the articles he has, by virtue of the certificate of which he is holder, an inchoate title to shares, but according to the 11th clause he does not become a member till the shares are fully paid up, and I do not think that he comes within the 74th section of the Act. In so doubtful a case I speak with great diffidence, but had the matter rested with me I should have thought that the petition could not be maintained.

* 526 * COOKES *v.* COOKES.

1865. March 10. Before the LORDS JUSTICES.

The Court of appeal will not, except in an extreme case, disturb the selection of a receiver by a Judge, unless there be some objection in point of principle to the person appointed. How objections in point of principle are to be treated where the order gives the person objected to liberty to propose himself as receiver.[1]

THIS was a motion by the plaintiff to discharge an order of Vice-Chancellor STUART appointing the defendant John Russell Cookes receiver of the rents of the real estates of the testator in the cause without salary.

The bill was filed in 1859 by one of the testator's children to carry into execution the trusts of his will, and there appeared to be a considerable amount of dissension among the parties. On the 9th of July, 1864, an order was made by the Vice-Chancellor on a petition by the defendant John Russell Cookes, and on a motion by the plaintiff for a receiver. By this order, among other things, directions were given for the appointment of a receiver, with liberty to the defendant John Russell Cookes to propose himself as such receiver.

The defendants, other than John Russell Cookes, appealed against so much of this order as directed the appointment of a receiver. The appeal was heard before the Lords Justices on the 28th of July, 1864. Their Lordships were of opinion that a receiver ought to be appointed, and the appellants not objecting to the liberty given to John Russell Cookes to propose himself as receiver, the appeal was dismissed.

At the time when the order of the 9th of July was made John Russell Cookes occupied a farm which was part of the testator's estate, and was also lessee of the right of sporting over the estate.

Disputes had arisen between the parties as to these matters,
* 527 and part of the * order was, that until further order John Russell Cookes should be allowed to continue in the occu-

[1] See Kerr Receivers (1st Am. ed.), 147, 148, 149; Ley *v.* Ley, 25 L. J. Ch. 600; Blakeway *v.* Blakeway, 2 L. J. Ch. N. S. 75; Perry *v.* Oriental Hotel Co., L. R. 5 Ch. Ap. 420; 2 Dan. Ch. Pr. (4th Am. ed.) 1738, 1739; Matter of Eagle Iron Works, 8 Paige, 385.

pation and holding of the farm and the right of sporting, paying for the farm the yearly rent of 222*l.* 9*s.* 2*d.*, and for the sporting the yearly rent of 50*l.*

The plaintiff under the above order proposed one person to be receiver; two of the defendants proposed another; and John Russell Cookes proposed himself. The Vice-Chancellor on the 26th of January, 1865, appointed John Russell Cookes receiver, he undertaking to act without salary. The plaintiff now applied to discharge this order.

Part of the plaintiff's evidence consisted of affidavits, tending to show that John Russell Cookes, who had previously managed the estates on behalf of his mother the surviving trustee of the will, was a keen sportsman, and disposed to preserve game to an extent very injurious to the tenants on the estate, and that some of them had already determined to give up their holdings if he was appointed.

The Attorney-General (Sir R. PALMER), *Mr. Malins*, and *Mr. George Lake Russell*, for the appeal motion. — There being a good deal of hostile feeling among the members of the family, it is, we submit, decidedly better for them that an indifferent person should be appointed receiver. The position of Mr. John Russell Cookes as lessee of a farm and the right of sporting gives him an interest which will conflict with his duties as receiver. Being a keen sportsman, it will be his interest to increase the game to an undue extent. The Vice-Chancellor said that if he did not manage the estate properly any party could apply to the Court; but we submit that the right course is to appoint a person who is under no bias, and

* not to appoint one who has an interest conflicting with his * 528 duty, which will occasion a risk of increasing the family dissensions by necessitating applications to the Court against him. The objections, we submit, are objections of principle, so that this is not an appeal from the mere discretion of the Vice-Chancellor.

Sir H. M. Cairns and *Mr. Charles Hall*, for Mr. John Russell Cookes. — The evidence shows that Mr. J. R. Cookes is a very good manager of landed property; his interest in the estates is larger than that of any of the other parties, and he is the most proper person to be appointed receiver. We say, however, that it is unnecessary to enter into that question, for that this is an appeal on

a matter resting in the discretion of the Vice-Chancellor. The fact of his being lessee of the right of sporting and of a part of the estate might perhaps have raised a question of principle; but that fact appears on the face of the Order of the 9th of July, and therefore must have been present to the mind of the Court when that order, directing the appointment of a receiver and giving him liberty to propose himself, was made. That order, therefore, involves a decision, that on the ground of principle his interest did not disqualify him. The question is, therefore, reduced to one simply of discretion, and this Court will not interfere with the Vice-Chancellor's exercise of that discretion.

Mr. Bacon, for the other defendants.

Mr. Malins, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — Upon a mere ques-
* 529 tion of the exercise of discretion in * the choice of one out of several candidates (if I may use the expression) proposed before the Vice-Chancellor for the office of receiver, the Court will find, according to its old practice and habits, the greatest difficulty in acting against the exercise of that discretion. To induce the Court to act in such a case against the decision of the learned Judge by whom the selection has been made, it would be necessary to find some (if I may use the expression) overwhelming objection in point of propriety of choice, or some objection fatal in point of principle.

Now, with regard to the first ground, the testimony in favour of the gentleman who has been selected by the Vice-Chancellor is, in the absence of any solid and substantial objection to his appointment arising from his connection with the estate, entirely satisfactory. His connection with the estate in point of interest, except in one particular, and his former connection with the management of it, afford no ground of objection whatever.

The point upon which I for some time felt some difficulty was his connection with the game, the circumstance that he has a lease of the game, for which he pays rent, and therefore that he may be said to have a conflicting interest with the tenants in that respect. Upon considering the matter, however, more fully, I do not think that of sufficient importance to warrant our rejection of the choice made

by the Vice-Chancellor, especially considering how many persons there are who are capable of watching and are willing to watch the conduct of this gentleman, and that the tenants also are to a certain extent very well able to protect themselves. I think, therefore, that there is no objection in point of principle, nothing rendering it necessary in point of duty, in administering the functions of this * Court, in a case of this description, to decide that * 530 a person having that interest ought not to be appointed. There will be vigilant eyes upon him, and the Court will always be ready to attend to any reasonable complaint, founded upon his interest in the game. But it does not appear to me sufficiently plain, that there will be any practical objection arising from his connection with the game, to render it necessary to object to his appointment.

We think, therefore, that, both on private grounds and upon general grounds, the objections to this gentleman fail, and that he should remain in the office to which he has been appointed.

THE LORD JUSTICE TURNER. — I am of opinion also that this order of the Vice-Chancellor ought not to be disturbed. According to the old practice of the Court, when these matters were under the consideration of the Masters, the settled rule and practice of the Court was, that the Court, in considering the question of who should be receiver, never entertained any objection to the Master's report which was not founded upon principle; and after the introduction of the new practice, I think very early after its introduction, the matter was brought under our consideration, and we held that, sitting as an appeal Court from the decision of the Judge upon the subject, we would act upon precisely the same principles which the Court had acted upon during the time when the old practice was in force, and would not entertain an application bringing in question the decision of the Judge as to the most fit person to be appointed receiver, unless the appointment was open to some objection upon principle. The question, therefore, in the present case must be, whether there is any objection * in principle to the * 531 appointment of Mr. John Russell Cookes to be receiver. If not, there is no ground on which this appeal can be maintained.

Two points have been urged in support of this appeal as questions of principle. First, it is said that there are great disputes and differences in this family, and that it is not for the interest of

the estate that this gentleman should be appointed receiver; but if the existence of differences and disputes is to be considered as a question of principle affecting the appointment of a receiver, it is obvious that there could hardly be any case in which it would not be competent to the parties to come here by way of appeal from the appointment of a receiver, for in cases where receivers are appointed it is almost always in consequence of the differences and disputes between the parties. I think, therefore, that the differences between these parties, unfortunate as they are, furnish no ground whatever for this application.

Upon the other part of the case, I, in common with my learned brother, have felt during the progress of the argument some difficulty, and I am not sure at what conclusion I should have arrived upon it, if I had considered the question to be wholly unprejudiced; for this gentleman stands in the position of lessee of the farm and lessee of the sporting, and in his character of receiver his duty would be to watch the proceedings of the tenants, both of the farms and of the sporting. But as I had supposed at first, and as it appears from *Mr. Malins's* observations in reply, upon the former occasion when the question was before us whether any receiver should be appointed, an order was made without any objection on the part of any of the parties, by which liberty was given to this gentleman to propose himself as receiver. Now in what position
* 532 did that order put * the case? Not, as I conceive, that the Vice-Chancellor was altogether absolved from considering the question of principle; but that, in determining who should be receiver, he was to take into account the question of principle. He could not, I think, consistently with that order, treat the position of this gentleman as a ground on which alone he ought to be excluded from the receivership. The case then, as it seems to me, comes to this, that, in determining who should be receiver, the Vice-Chancellor had to consider the position of this gentleman as tenant both of the farm and of the sporting, and to determine whether, under all the circumstances of the case, and having regard to this gentleman's position, it was or was not right that he should be appointed receiver. The question, therefore, before the Vice-Chancellor was, and before us is, not a question of exclusion upon principle, but a question of discretion under all the circumstances of the case. Taking the principle into account, and the Vice-Chancellor having exercised his discretion upon the sub-

ject, I do not think, that, consistently with the practice of the Court or with the interests of the suitors, we should be right in interfering with the order which he has made. My opinion, therefore, fortified also by the consideration that this gentleman has a much larger interest than any of the other parties have in the maintenance of the income of this estate, and that he is willing to act without salary, is, that this order must stand, and this motion must be refused, and my learned brother agrees with me in thinking that it ought to be refused with costs.

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* *In re* SKEGGS'S SETTLEMENT. * 533

1865. March 24. Before the LORDS JUSTICES.

Real estate was settled by a marriage settlement, not comprising any personal estate. The tenant for life sold part of the land to a company under the powers of their Act, and the proceeds were paid into Court and invested. Afterwards the tenant for life, under a power in the settlement, appointed by will to his son the whole settled estate and the purchase-money of the part which had been sold. The son by will disposed of his residuary personal estate of which he might be possessed or over which he might have any power of disposition at his decease, including in such personal estate "all moneys to which I may be entitled under the marriage settlement of my father and mother;" and he declared that he did not by his will intend to dispose of any real estate, but only of personal estate and chattels real. The widow of the tenant for life, who was entitled to a jointure, was still living: *Held*, by the Lord Justice TURNER, affirming the decision of Vice-Chancellor KINDERSLEY, the Lord Justice KNIGHT BRUCE doubting, that the fund arising from the sale did not pass by the will.

THIS was an appeal by the personal representative of John Francis Skeggs from a decision of Vice-Chancellor KINDERSLEY, holding that a sum of 300*l*., which was in equity real estate, was not disposed of as personal estate by the will of J. F. Skeggs.

By a marriage settlement of the 26th of September, 1822, certain real estate was limited to the use of John Skeggs for life, remainder to the use that his wife Mary Skeggs might receive a jointure of 200*l*. per annum for her life, and subject thereto to the use of all and every or such one or more of the children of the marriage for such estates, &c., &c., as John Skeggs should by deed or will.

appoint, and in default of appointment to the use of the children as therein mentioned. This settlement did not include any personal estate.

In April, 1844, John Skeggs, as tenant for life, sold a part of this property to the guardians of the Bromley Union for 300*l.*, which was paid into Court pursuant to the Act 5 & 6 Will. 4, c. 69, for facilitating the conveyance of workhouses.

* 534 * On the 18th January, 1845, an order was made for the investment of this sum and payment of the dividends to the tenant for life, and the 300*l.* was invested in the purchase of 302*l.* 13*s.* consols.

John Skeggs died in 1858, having by will dated the 21st of November, 1851, after reciting the settlement, appointed "the whole of the hereditaments so settled on my marriage as aforesaid (and including the sum of 300*l.* paid into the Bank of England as the purchase-moneys for three and a half acres of land, part of the said settled estates, taken in the month of April, 1844, by the guardians of the poor of the union of Bromley in Kent) unto and to the use of my only surviving son John Francis Skeggs, his heirs and assigns for ever." The testator also, under a limited power in the will of Mary Skeggs, appointed a large legacy to John Francis Skeggs, and appointed to him a life-interest in a fund of personalty created by the testator, but did not bequeath to him any capital sum out of his, the testator's, own property.

J. F. Skeggs by will dated the 10th of January, 1859, bequeathed to his wife all the personal estate and effects (except money and securities for moneys) which should at his decease be in or about his then dwelling-house, "and as to all the residue and remainder of my personal estate and effects whatsoever and wheresoever of which I shall be possessed or over which I shall have any power of appointment or disposition at the time of my decease, and including in such personal estate all moneys to which I may be entitled under the settlement made on the marriage of my father and mother, or under the will of my said father, or under the wills of my late aunts Elizabeth Skeggs and Mary Skeggs, or either of them, or any appointment made by my said father under the

* 535 * power given to him by the wills of my said aunts, and all money due to me on mortgages or otherwise, I bequeath, appoint, and dispose of the same unto my wife and J. C. Forster, their executors and administrators, upon trust that they, or the

survivor of them, &c., shall as soon as conveniently may be after my decease call in, sell, and convert into money such parts of my residuary personal estate as shall not consist of money. And I hereby direct that my said trustees shall stand possessed of and interested in the moneys to arise from the sale, getting in and conversion into money, and also of and in the ready money and money in the stocks or funds of or to which I may be possessed or entitled at the time of my decease, upon trust with and out of the same moneys to pay," &c. [Here followed trusts for payment of debts and legacies, and subject thereto for the benefit of the testator's wife and children.] "And I hereby declare that it is not at present my intention to make any devise or disposition of any freehold or other real estate of which I may be seised, possessed, or entitled at the time of my decease, meaning that this my will shall apply only to my personal estate and chattels real."

John Francis Skeggs died in June, 1864, his mother, the jointress, being still living. His widow, who was now his sole trustee and executrix, and the mother presented a petition for payment of the 302*l.* 13*s.* consols to the widow. This was opposed by the sister of J. F. Skeggs, who was his heiress-at-law.

Vice-Chancellor KINDERSLEY having decided that the 302*l.* 13*s.* was not disposed of by the will of J. F. Skeggs, his widow appealed.

Mr. F. H. Colt, for the appellant.

Mr. Jessel, for the respondent.

*THE LORD JUSTICE TURNER.—The testator's will con- *536
tains an express declaration that it was not his intention at present to make any disposition of real estate, and that he intended his will to apply only to his personal estate and chattels real. In the face of this declaration a very strong context is requisite to make any real estate pass under the dispositions of the will. It has been argued that this sum of stock, which had the nature of real estate, must pass under the gift of personal estate, because the testator has said that in his dispositions of personal estate he includes all moneys to which he may be entitled under the marriage settlement of his father and mother, for I see no other words furnishing any ground for the contention that this

sum can pass. Now this fund was stock forming part of the estate which was subject to the jointure of the testator's mother. The testator no doubt had power to say, that as between his real and personal representatives it should be taken as personal estate, but a very clear declaration of such an intention would be requisite, for this is not the common case of election by a party absolutely entitled, but a case where the testator had no power to elect to take the fund at once as money, his mother having a right to require it to be invested in land. All therefore that he could do was to declare, that as between his own real and personal representatives it should be money. Now the testator in his disposition of personal estate uses expressions which show that he was referring to the state of circumstances as they might be at his decease. Before that time acts might have been done which would have converted the fund into personal estate, and assuming that the word "money," as used in this will, would include stock, a point upon which I do not think it necessary to give any opinion, it does not follow that this stock which was in the nature
* 537 of real * estate would pass, there being nothing to show that the testator intended to refer specifically to the property which he had at the time. I am of opinion therefore that there is not enough on the face of the will to countervail the clear expression of intention to dispose of personal estate only.

THE LORD JUSTICE KNIGHT BRUCE. — I feel some difficulty as to this case, but the agreement of my learned brother and the Vice-Chancellor KINDERSLEY renders that difficulty immaterial. Their united opinions, I need not say, are very likely to be right.

BEST *v.* STONEHEWER.

1865. March 21, 28. Before the LORDS JUSTICES.

A testator gave the proceeds of the sale of his real estates after the determination of certain life-estates "to such person or persons as shall at that time be the nearest in blood to me, as descendants from my great-grandfather J. S., and whose kindred with me originates from him." At the date of the will the only lineal descendants of J. S. were the testator and his sister, a

lady above sixty years of age: *Held*, by the Lord Justice TURNER, affirming a decree of the Master of the Rolls, the Lord Justice KNIGHT BRUCE dissenting, that the objects of gift were such persons as were nearest in blood to the testator out of a class composed both of the descendants of J. S. and of the persons whose kindred with the testator originated from their being related to J. S.

THIS was an appeal by the plaintiff from a decision of the Master of the Rolls in the construction of the will of Thomas Fenton Grosvenor.

The testator devised certain real estate to G. N. Best in fee, in trust, after the determination of life-estates given to the testator's wife, to his sister Mrs. Brentnall, to a Mrs. Sparrow and a Mrs. Moreton, to sell the same and pay the net proceeds "unto such person or persons as shall at the time of the decease of the survivor of my * said dear wife, my sister, and the said * 538 Mrs. Sparrow and Mrs. Moreton, be the nearest in blood to me as descendants from my great-grandfather Joshua Stonehewer, and whose kindred with me originates from him, as well females as males and whether from females or males; if more than one in equal degree then in equal shares and proportions, but if only one then to such only one, and to their, his, or her heirs and assigns. And I further devise that every relation or relations claiming under this my last will and testament is and are subject to the full payment of all such just debts as I may owe at the time of my decease."

The testator died on the 3d of December, 1831, without ever having had any issue, leaving his sister Mrs. Brentnall his heiress-at-law.

The only descendants of Joshua Stonehewer the grandfather who were living at the date of the testator's will were the testator himself and Mrs. Brentnall, and the testator was aware of this fact when he made his will. He was at that time at least sixty years old, and Mrs. Brentnall older.

Mrs. Brentnall died in 1843, leaving a will by which she gave all her property to G. N. Best, who died in 1846, and the plaintiff his only son was entitled to all his real estate, and thus became beneficially entitled to whatever devisable interest Mrs. Brentnall had in the testator T. F. Grosvenor's real estate. It was admitted that on the death of the plaintiff's father the legal estate in the real property devised by the testator's will vested in the plaintiff.

The last tenant for life died in August, 1863, and at that
* 539 time there was not living any lineal descendant of * Joshua Stonehewer. The plaintiff filed his bill claiming to be sole beneficial owner of the estates on the ground that the beneficial interest in the estates after the death of the last tenant for life was undisposed of and so vested in him as claiming under Mrs. Brentnall, and praying for a declaration of the rights of the parties. The Master of the Rolls made a decree declaring that the plaintiff was a trustee of the testator's real estate for the persons who at the death of the last tenant for life were his kindred of the nearest degree collaterally related to his great-grandfather Joshua Stonehewer. From this decree the plaintiff appealed.

Mr. Selwyn and *Mr. Charles Hall*, for the appellant. — The word "descendants," unless explained by the context, means "posterity," and the context here does not alter its effect, the words "whose kindred with me originates from him" only strengthening the expression by pointing to Joshua Stonehewer as the ancestor from whom the descent was to be traced. If the decision of the Master of the Rolls is upheld, you cannot stop short of saying that Joshua Stonehewer's brother might have taken, though it would be contrary to the use of language, whether technical or legal, to call a man's brother his descendant. *Crossly* v. *Clare*, (*a*) *Craik* v. *Lamb*, (*b*) Johnson's Dict. "Descendants," Webster's Dict. "Descendants," *Williams* v. *Williams*, (*c*) *Earl of Tyrone* v. *Marquis of Waterford*, (*d*) Stephen's Blackst. Com. (*e*) *Robinson* v. *Shepherd*. (*g*)

Mr. Southgate and *Mr. Prendergast*, contra. — We do not
* 540 dispute that the word "descendants" *primâ* **facie* means the same as "issue;" but the Court must place itself in the situation of the testator before proceeding to construe his words. He was an old man, and had a wife beyond the age of child-bearing. The only relation he had who was lineally descended from Joshua Stonehewer was Mrs. Brentnall, who was about seventy years old and childless. The testator certainly was not speaking of children whom he might himself have, for it would be absurd to say that

(*a*) Ambl. 397; 3 Swanst. 320.
(*b*) 1 Coll. 489.
(*c*) 1 Sim. (N. S.) 358, 371.
(*d*) 1 De G., F. & J. 613, 627.
(*e*) Vol. 1, p. 376 (3d ed.).
(*g*) 12 W. R. 234, L. C.

their relation with him originated from Joshua Stonehewer. The expression "collateral descendant" may not be logically accurate, but it is recognized. In the Act to amend the Law of Inheritance (3 & 4 Will. 4, c. 106), the word "descendant" is used for any person in the line of descent, and a similar sense is given to the word by Sir T. CLARK, in *Crossly* v. *Clare*.(*a*) *Craik* v. *Lamb* (*b*) is an instance of technical words being diverted from their ordinary meaning so as to effect the intention. The position of the family corroborates the indications of intention from the will itself, which alone are sufficient, for the words "whose kindred with me originates from him" are immaterial surplusage, except on our construction.

Mr. Charles Hall, in reply.

Judgment reserved.

March 28.

The Lord Justice TURNER, after stating the facts of the case, proceeded as follows: —

The question we have to decide upon this appeal is, whether, in consequence of there not having been any * de- * 541 scendant of the testator's great-grandfather Joshua Stonehewer living at the time of the decease of the survivor of the four tenants for life, the reversion in fee of the estates expectant upon the determination of the life-interests descended to the heir of the testator, or was well disposed of by the will in favour of the defendants and the other persons, if any, whose kindred with the testator originated from the same source. The will is certainly difficult of construction, but upon the whole my opinion upon it agrees in substance with that of the Master of the Rolls. The will, as I read it, gives the estates, or rather the proceeds of them, to the persons or person of a specified class or classes who at the specified time shall be nearest in blood to the testator; the words "as descendants from my great-grandfather Joshua Stonehewer, and whose kindred with me originates from him," describing the class or classes from which the devisees or legatees are to be taken, and the words "nearest in blood to me" describing what members of the class or classes are to be taken. Looking at the case in this

(*a*) 3 Swanst. 320, 323. (*b*) 1 Coll. 489.

point of view, the true question seems to me to be, whether the words descriptive of the class or classes from which the devisees or legatees are to be taken are to be construed as referring to one set of persons only, the descendants from the great-grandfather, or to two sets of persons, those descendants and also the persons whose kindred with the testator originated from the great-grandfather. In my opinion the words in question ought to be construed as referring to the two sets of persons, and not to the one set only, and I think so for this reason, — effect ought, if possible, to be given to every word of a will; but if these words are construed as referring to one set of persons only (the descendants from the great-grandfather), no effect is given to the words "whose kindred with me originates from him," for the kindred with the
* 542 testator of every descendant of the * great-grandfather must of necessity originate with the great-grandfather. It was argued, for the appellant, that these latter words do not admit of being construed otherwise than as applying to descendants of the great-grandfather, — that they are, in fact, no more than an emphatic declaration by the testator that those descendants (and those descendants only) were the persons who were intended to be the objects of the testator's bounty; but I cannot assent to that argument. I think these words were intended to apply to persons whose kindred with the testator resulted from his (the testator's) descent from the great-grandfather. This question depends very much upon the meaning which the testator attached to the word "originate," and it is remarkable that this word is used by the testator in another part of his will, where he devises other estates. He there speaks of estates originating from his consanguinity with a person whom he names, thus treating the word "originate" as importing the source from which the estates were derived. So in the clause under consideration, I think he has used the word "originate" in the same sense as importing the source from which the kinship was to be derived. The view which I have thus taken of the construction of this will is, I think, much strengthened by the fact of the testator's having been, when he made his will, aware of the state of his family, and that he and his sister were then the only living descendants of his great-grandfather. With that knowledge it is scarcely possible, I think, to suppose that he could intend to confine this disposition to the great-grandfather's descendants. That he might possibly himself have children does not seem

to me to vary the case upon the question whether this disposition was meant to extend to others than descendants of the great-grandfather, for if he had children they would be the nearest in blood to him as such descendants. It is upon these grounds I agree, in substance, with his Honor's * decision, but I am * 543 not quite satisfied that the decree is correct in form. I think that there would be much difficulty in dealing with this case on further consideration without its being ascertained otherwise than by the admission of the parties, all of whom have adverse interests, that no descendant of the great-grandfather was living at the death of the survivor of the tenants for life, and I think that it would be better to adapt the declaration and inquiry more nearly to the terms of the will. The form of decree which I propose is, to declare that, according to the true construction of the will, the plaintiff is a trustee of the estates in question, or of the proceeds of the sale thereof, for such person or persons as at the time of the decease of the testator's wife were or was nearest in blood to the testator of a class composed of the descendants of the testator's great-grandfather Joshua Stonehewer, and of the persons whose kindred with the testator originated from their being related to his said great-grandfather, with an inquiry who were or was the persons or person living at the time aforesaid who, being descendants or a descendant of the testator's great-grandfather Joshua Stonehewer, or being persons or a person whose kindred with the said testator originated from their, his, or her being related to the said testator's said great-grandfather, were or was nearest in blood to the said testator. The decree in this form will, I think, be more correct, and as it will lead to the same result as the decree which has been made, my learned brother does not, I believe, object to the alteration I have suggested, although he does not, I fear, altogether agree with me in the construction I have put upon the will.

THE LORD JUSTICE KNIGHT BRUCE. — I acknowledge that I am unable to read this will in the same way as the Master of the Rolls or the Lord * Justice, but as they substantially * 544 arrive at the same conclusion, I think that I ought not to dissent from the alterations which the Lord Justice proposes in the decree, for, assuming their view, that collateral relations of Joshua Stonehewer can take under this gift, to be correct, those alterations appear to me to be right and proper.

In the Matter of The SCOTTISH AND UNIVERSAL FINANCE BANK, LIMITED; and in the Matter of The COMPANIES ACT, 1862.

SHIP'S CASE.[1]

1865. April 19. Before the LORDS JUSTICES.

The prospectus of a proposed company described as a "finance bank" stated eight objects, some of which went beyond ordinary banking business. In May, S., on the footing of this prospectus, applied for 50 shares, and paid the deposit. On the 1st of June the company was registered with a memorandum of association defining its objects, which went considerably further beyond the ordinary business of banking than the objects mentioned in the prospectus, and on the same day the directors sent S. a letter of allotment of 50 shares. In December of the same year the company failed. S. applied to have his name taken off the register, on the ground that he never had agreed to become a shareholder in a company with these extended objects. There being no evidence to rebut S.'s positive oath, that until the company had failed he never had any notice of the extension of the objects of the company beyond those named in the prospectus: *Held*, affirming the decision of Vice-Chancellor WOOD, that his name ought to be removed from the register.[2]

THIS was a motion by the official liquidator by way of appeal from a decision of Vice-Chancellor WOOD.

On the 5th of May, 1864, a prospectus was issued which was in part as follows: —

"Scottish and Universal Finance Bank.
"To be incorporated under the Limited Liability Act.
"Capital one million.
"With power to increase to five millions.
"Twenty thousand shares of 50*l.* each; first issue, ten thou-

[1] Affirmed in House of Lords, Downes *v.* Ship, L. R. 3 H. L. 343.

[2] See Stewart's Case, L. R. 1 Ch. Ap. 574, 586, 587; Lawrence's Case, L. R. 2 Ch. Ap. 412, 421; Wilkinson's Case, L. R. 2 Ch. Ap. 536; Peel's Case, L. R. 2 Ch. Ap. 674; King's Case, L. R. 2 Ch. Ap. 714; Kennedy *v.* Panama, &c., Mail Co., L. R. 2 Q. B. 580; Hallows *v.* Fernie, L. R. 3 Eq. 520; Bwlch-y-Plwm Lead Mining Co. *v.* Baynes, L. R. 2 Exch. 324; Ship *v.* Crosskill, L. R. 10 Eq. 83. The right to repudiate shares on the ground of a variance between the prospectus and memorandum may be lost by delay. Lawrence's Case, L. R. 2 Ch. Ap. 412; Wilkinson's Case, L. R. 2 Ch. Ap. 536; Peel's Case, L. R. 2 Ch. Ap. 674.

sand shares; 1*l.* on application; 4*l.* on allotment; *and *545
5*l.* in three months. It is not intended to call up more than 25*l.* per share.

. . . . . .

"Prospectus.

"The success attained by the *Crédit Mobilier* of Paris has recently led to the establishment of somewhat similar institutions in London, their introduction meeting with marked success, as is evidenced by the large dividends paid to their shareholders and increased value of the shares, such increase being from 100 to 200 per cent on the amount paid.

"The fact that Scotland, notwithstanding the magnitude and rapid increase of her commerce, has no institution of the kind contemplated, has suggested to the projectors of the present company the formation of an institution founded on similar principles to the *Crédit Mobilier* of Paris, but embracing a larger field for its operations.

. . . . . .

"The objects proposed to be effected by the company are,—

"1. To receive money at call or on deposit for fixed terms, and the ordinary business of bankers.

"2. To grant temporary or permanent loans on approved public securities, or private undertakings of undoubted merit and known solidity.

"3. To make advances on merchandise and dock and other warrants; on title-deeds of property in possession or reversion, for any temporary purpose; on contracts for carrying out or the finishing of works; or any other security where their safety is unquestionable and the benefit to the company sufficiently advantageous.

"4. The purchase and sale of the precious metals in all their forms. The company will be enabled by its facilities and connections to import and export bullion *and to deal in *546
foreign coins and bank-notes on an extensive scale.

"5. By means of the Paris branch, it is proposed to undertake the shipment of silver to the East *viâ* Marseilles, which can be done at a considerable saving of expense and time.

"6. The business transacted by the issue of small bills and letters of credit for the convenience of travellers and emigrants is incredible. Remittances from America to Ireland alone amount to several millions sterling per annum. By affording the same

facilities to the English, German, and French population of America, it is confidently anticipated that most profitable business can be done.

"7. To negotiate approved foreign or inland bills, to transmit funds in specie and in bills or otherwise to any foreign state, and to arrange purchases or sales of any British or foreign securities at home or abroad.

"To cash coupons and to realize or undertake the management of the dividends on loan or other securities."

Annexed to the prospectus was a form of application for shares in the following terms: —

"To the directors of the Scottish and Universal Finance Bank, Limited.

"Gentlemen, — Having paid to your bankers, the Imperial Bank, Limited, the sum of , being a deposit of 1*l.* per share on shares in the above company, I hereby request that you will allot me that number, and I agree to accept such shares or any less number you may allot to me; to pay the deposit on allotment, and to sign the articles of association of the company when required; and I authorize you to insert my name on the register of members for the number of shares allotted to me."

* 547 * Towards the end of May, 1864, Mr. Ship applied for fifty shares, by detaching the above form, and forwarding it to the directors, with a check for 50*l.* On the 1st of June the directors sent him a letter of allotment for fifty shares.

On the 5th of May, 1864, a memorandum of association was registered, the clauses of which were as follows: —

"1. The name of the company is the Scottish and Finance Bank, Limited.

"2. The registered office of the company will be situate in England.

"3. The objects for which the company is established are for general banking purposes, and for the purchase, importation, and exportation of bullion and specie in all forms.

"4. The liability of the members is limited.

"5. The capital of the company is 2000*l.*, divided into forty shares of 50*l.* each."

This company was registered without articles.

On the 1st of June, 1864, a document signed by the seven persons who had signed the memorandum of association was registered, which was as follows: —

"To the Registrar of Joint-stock Companies.

"Sir, — The undersigned, being the persons who signed the memorandum of association of the Scottish and Universal Finance Bank, Limited, and registered without articles of association on the 5th day of May, 1864, and being all the members of that company, hereby testify that the said company is in course of being dissolved, and consent to the registration of the said company * called the Scottish and Universal Finance Bank, * 548 Limited, formed under a memorandum and articles of association dated the 1st day of June, with a capital of 1,000,000*l.* sterling, divided into 20,000 shares of 50*l.* each."

The memorandum of association of the 1st of June, 1864, described the objects of the company as follows: —

"The objects for which the company is established are the transacting in Great Britain, and in foreign parts, every kind of business; the receiving of deposits of money whether at interest or otherwise, the advancing and lending of money on real, personal, or mixed securities, and on cash, credit, or other accounts, on policies, bonds, debentures, bills of exchange, promissory notes, letters of credit or other obligations, on ships and shares of ships either British or foreign, on rates or tolls of trustees or commissioners of public docks, harbours, or other public works, or of any other bodies of persons, whether corporate or otherwise, duly authorized to make, levy, or collect rates or tolls under the provisions of any local or general Act of Parliament; the discounting bills of exchange, promissory notes, or other obligations; the advancing money on the deposit of title-deeds, goods, wares, and merchandise, bills of sale and bills of lading, delivery orders, warehousemen's or wharfingers' certificates and notes, dock warrants, or other mercantile *indicia*, symbols, or tokens, bullion, government or public stocks or funds, whether British, colonial or foreign, exchequer and navy bills, bank and East India stock, stocks and shares of bankers and of banking companies and insurance com-

panies, railway, canal, gas, and water companies, and in general of all other joint-stock companies, corporations, associations, and other undertakings of whatever nature or description, whether
* 549 British, colonial, * or foreign annuities, produce of every description both home and foreign, materials of any kind whether raw or manufactured, and whether home or foreign, and on any other property, funds, and effects of whatever kind or description; the making purchases, investments, sales, or any other dealings in any of the above-mentioned articles or securities, or in ships or shares of ships, both British and foreign; and the doing of all matters and things which may appear to the company to be incident or conducive to those objects.

"1. To negotiate loans of all descriptions.

. . . . . .

"3. To take concessions by purchase or otherwise of or lease or work railways or other undertakings, and either carry them out itself, or in conjunction with other companies or parties, or make them over wholly or partly to other companies or parties.

"4. To take contracts and carry them out either on its own account or by letting them to sub-contractors.

. . . . . .

"9. To enter into treaty, act, or unite with, amalgamate, buy up, or absorb any other company or business, whether English or foreign, &c., &c.

"10. Generally to transact any business of bankers, bullion and exchange bankers, and of a merchant, contractor, and capitalist, as principal or agent, in any part of the world, which may not in the articles of association or by special resolutions of the company be prohibited."

Mr. Ship's name was put on the register of shareholders for fifty shares. The company in December, 1864, turned out a complete failure, and shortly afterwards an order was made for winding it up. Mr. Ship moved to have his name taken off the register, deposing that until the company had failed he had no notice whatever of the memorandum or articles of June, 1864.
* 550 * Vice-Chancellor WOOD, before whom the motion was heard, made an order for removing Mr. Ship's name from the register. The official liquidator moved by way of appeal to discharge this order.

March 17.

On the appeal motion being opened, *Mr. W. W. Mackeson*, on behalf of Mr. Downes, a director, asked leave to intervene.

Mr. Locock Webb, for Mr. Ship, opposed.

Their Lordships asked whether the applicant would admit himself to be a contributory, intimating that unless he did so he had no *locus standi*. *Mr. Mackeson* stated that Mr. Downes would admit himself to be a contributory in respect of one share; but their Lordships considering this limitation inadmissible, he agreed to admit himself to be a contributory.

Their Lordships then directed the motion to stand over with liberty to Mr. Downes to give a notice of motion to discharge the order under appeal, admitting on the face of the notice his liability as a shareholder, but not limiting the extent of such liability. Mr. Downes gave notice of motion accordingly.

April 19.

Mr. Giffard and *Mr. W. Morris*, for the official liquidator. — Mr. Ship has done every thing necessary to make him a shareholder. 25 & 26 Vict. c. 89, §§ 16, 26, 32, 33. He sent a general authority to enter his name as a shareholder, and it lay on him to see that the company ultimately formed was exactly what he intended to enter. If he did not choose to take that trouble, he and not the creditors must be the person to suffer. The terms of
* the authority given by him were so wide, that even assuming the constitution of the company to differ substantially *551
from that contemplated by the prospectus, he is bound as regards third parties. *Duke of Beaufort* v. *Neeld*. (*a*) Knowledge of the articles of association must be imputed to Ship, and at all events the duty of inquiry lay on him. It is absurd for him to say that he intended to take shares in the company incorporated on the 5th of May, for he agreed to take fifty shares, and there were only forty shares in that company. The company ultimately formed does not materially differ from that contemplated by the prospectus; the prospectus does not say that the objects there enumerated are to be the only objects of the company, and there is a

(*a*) 5 Jur. 1123; 12 Cl. & Fin. 248.

reference to the *Crédit Mobilier* which shows that it was intended to go beyond those objects.

Mr. Daniel and *Mr. W. W. Mackeson*, for Mr. Downes. — The evidence shows that a company whose objects did not extend beyond the eight objects specifically mentioned in the prospectus would not be a finance bank at all according to the recognized meaning of that expression. Ship was bound to know the contents of the articles of association. *Sheffield's Case*, (*a*) *Ex parte The Eagle Assurance Company*. (*b*) Then Mr. Ship acquiesced for eight months, and never made any complaint until the company had turned out a failure.

Mr. Rolt and *Mr. Locock Webb*, for Mr. Ship, were not called upon.

* 552 * THE LORD JUSTICE KNIGHT BRUCE. — The first question in this case is the true construction of the prospectus (as it is called) headed by the title "Scottish and Universal Finance Bank, Limited," which forms part of this case. It contains a good deal of flourish and ornamental recommendation of the scheme which it holds forth, and refers in particular to the *Crédit Mobilier* of Paris in these terms: "The success attained by the *Crédit Mobilier* of Paris has recently led to the establishment of somewhat similar institutions in London, their introduction meeting with marked success, as is evidenced by the large dividends," &c. That is a part of the ornamental portion of the prospectus. But what I should call the business part of the prospectus begins with the words, "The objects proposed to be effected by the company are" — not "some of the objects," not alluding to any similarity or analogy, but "the objects proposed to be effected by the company are," and then eight objects are enumerated. Now it appears that the institution or business in which the present respondent is sought to be involved extends to matters going considerably beyond the eight objects here specified. The question is whether, by his conduct with reference to the prospectus, the respondent agreed to become a partner in a concern going considerably beyond those eight objects? I think that he did not.

(*a*) Johns. 451, 458. (*b*) 4 K. & J. 549.

His application for shares must be considered as having reference to the terms of the prospectus, and so must his acceptance of the shares. It does not appear that he ever was aware of the fact of the memorandum or articles of association extending beyond those eight objects, or that he ever agreed to be a member of a concern extending beyond them. If indeed it had been shown that he was aware that the company was carrying on a business materially * extending beyond those objects, that * 553 might have made a material difference, for he might have been held to have submitted to the change. But there is a total absence of any evidence to satisfy me that he ever was aware, or that any authorized agent of his was ever aware, that the memorandum or articles of association went beyond the prospectus. It appears that the business actually carried on has been carried on under articles of association going materially beyond the prospectus. It is said that in consequence of his having contracted to be a shareholder in the institution described in the prospectus he has bound himself to be a shareholder in the more extended institution. I think that he agreed to one thing, and that the appellants desire that he should be considered as being bound to another thing. He never, in my judgment, agreed to become and never did become a partner in any such business as that which was actually carried on, and consequently he had a right to be relieved in the manner in which the Vice-Chancellor has relieved him. The order appears to me perfectly right.

THE LORD JUSTICE TURNER. — I also am of opinion that the Vice-Chancellor's order was right. The question before us is this, whether Mr. Ship ever became a partner in this association. In determining that question I throw out of consideration the memorandum of association of the 5th of May; for I have no idea that Mr. Ship ever intended to become a member of this company, according to its constitution under that memorandum. I assume, therefore, the case to depend wholly on the question whether Mr. Ship is a member of the company as constituted by the memorandum of the 1st of June. That depends upon the * prospectus and upon the application for shares made by * 554 Mr. Ship. Now the prospectus purports to be a prospectus of "The Scottish and Universal Finance Bank." No doubt some effect must be given to the word "finance," which is contained in

that description. But when we look at the terms of the prospectus, we find that there are mentioned amongst the objects of this company matters which go beyond the ordinary business of bankers; as, for instance, the purchase and sale of precious metals, business transacted by the issue of bills, &c. Having then before us a prospectus describing an association as a finance bank, and then stating as its objects, in addition to the ordinary business of banking, certain particular objects, which go beyond the ordinary business of a bank, I think that we must take the financial part of the description as referring to those matters not part of ordinary banking business, which are specifically described in the prospectus. Then it is to be considered, whether the objects defined by the memorandum of association of the 1st of June are substantially within the objects specifically described in the prospectus. Now, that memorandum defines the objects of the company, amongst others, to be these: "The objects for which the company is established are the transacting in Great Britain and in foreign parts every kind of business." Then there is a power of making advances which, though very extensive, may be within the scope of the ordinary business of bankers, but at its close we find "the making purchases, investments, sales, or any other dealings in any of the above-mentioned articles or securities, or in ships or shares of ships, both British and foreign, and the doing of all matters and things which may appear to the company to be incident or conducive to those objects." [His Lordship then read the 3d, 9th, and 10th of the numbered clauses in the memorandum.]

* 555 It seems to me that, giving the most extended * effect to the prospectus, it is impossible to say that its terms could warrant this gentleman being made a partner in a concern which is not confined to such business as is in any sense analogous to banking, but extends in terms to the business of "a merchant, contractor, and capitalist." I think that this gentleman never had any intention whatever of becoming a partner in any such concern as is provided for by the memorandum of association of the 1st of June, 1864, and that it is impossible to hold him bound to become so.

Then it was said on the part of the appellants, "How can the Court interfere with the rights of the creditors of the company by taking Mr. Ship's name off the list of contributories? The creditors of the company trusted Mr. Ship, as his name appeared on the

register of the company." The answer is this: The creditors of the company trust the company and those who are or may be members of the company. They do not trust individual members of the company, otherwise than as being members of the company; and if they are members of the company, no doubt they are liable to the creditors. No doubt persons whose names appear on the register may, whether they are rightfully members or not, have made themselves individually liable to creditors of the company by reason of acts done by themselves as individuals in connection with the affairs of the company. Thus, for instance, if Mr. Ship, acting on the part of this company, ordered goods for the company, he may be liable as an individual on the ground of his having made a separate contract; but no such point arises here, and no order which we make on the present occasion will affect any liability of that kind, if any such exists. The question before us is, not whether he is liable as an individual in respect of any such contract, but whether he is liable as having become *a *556 partner in this concern, and I am perfectly satisfied he never intended to become and never did become such partner. I therefore think that the order is right.

It is unnecessary to enter at length upon what has been said as to Mr. Ship's conduct. Upon the evidence before us we are bound to assume that, up to December, 1864, Mr. Ship had no knowledge of these transactions. If it had been shown that he had acted with knowledge of the memorandum of association of the 1st of June, 1864, the case would have been wholly different; but as the case stands, there is a total absence of any thing to meet the positive oath of Mr. Ship, that he had no knowledge whatever of the memorandum of association of the 1st of June, 1864.[1] I think that both motions ought to be refused with costs.

[1] See Stewart's Case, L. R. 1 Ch. Ap. 574, and *ante*, 544, note (1).

* 557

* FORD *v.* TYNTE.

1865. April 24, 25, 26. Before the LORDS JUSTICES.

A father and son disentailed the family estate, and resettled it to the use of the father for life, remainder to the son for life, with divers remainders over, the son having a power given him of providing a jointure for his wife and portions for younger children. By a settlement made in contemplation of the marriage of the son, and bearing even date with the resettlement, the son exercised these powers to their full extent. By another deed of the same date, reciting that the son would be entitled to the estates on the death of his father, the son purported to charge the estates with the payment of the further sum of 1200*l.* a year as a jointure for the wife, and the further sum of 10,000*l.* as portions for younger children, the additional jointure to be paid at the same times, in the same manner, and with the same powers for its recovery, as the original jointure, and the additional portions to be raised at the same time by the same means and in the same manner as the original portions. And the son covenanted that as soon as he came into possession he would convey the estates to the trustees of the settlement to such uses and for such estates for securing the additional jointure and portions as were expressed and contained in the settlement for securing the original jointure and portions: *Held*, that the parties to the last-mentioned deed had no intention to make the additional jointure and portions affect the estates during the life of the son, and that the deed did not affect the son's life-estate, although the holding it not to affect this life-estate made it wholly inoperative.

THIS was an appeal by the wife and younger children of Colonel C. J. K. Tynte from a decision of Vice-Chancellor WOOD, that they were not entitled to any lien on the life-estate of Colonel Tynte, by virtue of a certain deed, by which he agreed to provide a further jointure for his wife, and further portions for his younger children.

In April, 1841, certain estates stood limited to Colonel C. K. K. Tynte, for life, with remainder to his eldest son C. J. K. Tynte, in tail, with remainders over.

On the 8th of April, 1841, the father and son disentailed the estates, and limited them to such uses as they should jointly appoint, and in default of appointment to the old uses.

On the 10th of April, 1841, the father and son, by exercise of their power, resettled the estates. The limitations, so far
* 558 as they need be stated for the purposes of * the present question, were to C. K. K. Tynte for life, with remainder to

C. J. K. Tynte for life, with divers remainders over. This deed contained a power to C. J. K. Tynte to appoint to any woman he might marry a jointure rent-charge not exceeding 800*l.* a year, to commence after the decease of the survivor of father and son, and a power to him to appoint the estate to trustees for a term to commence from the same period, upon trust for raising portions for younger children to an amount not exceeding 10,000*l.*

A marriage was at this time about to be solemnized between C. J. K. Tynte and Miss V. Brabazon, and in contemplation of this marriage a settlement dated the same 10th of April, 1841, was executed. By this deed C. J. K. Tynte, in exercise of his power of jointuring, appointed to Miss Brabazon, in case the marriage should take effect and she should survive him, a yearly rent-charge of 800*l.* for her life, to commence from the death of the survivor of himself and his father, and to be issuing out of all the property comprised in the last-mentioned deed, with the usual powers of distress and entry, and a term was limited to trustees for better securing it. By the same indenture C. J. K. Tynte limited the estates to trustees for another term upon trusts for raising 10,000*l.* for portions for younger children of the intended marriage.

By another deed dated the same 10th of April, 1841, and made between C. J. K. Tynte of the one part, and Mrs. Brabazon, the mother of the intended wife, of the other part, reciting that a marriage was intended shortly to be solemnized between C. J. K. Tynte and V. Brabazon, and that by certain indentures or articles of settlement executed in contemplation of the marriage or intended so to be, a rent-charge or annuity of 800*l.* a-year * had * 559 been granted and assured or otherwise charged upon and issuing out of certain estates at Halswell in Somersetshire, for the benefit of V. Brabazon, as and for her jointure; and by the same indentures the principal sum of 10,000*l.* had been also charged or secured on the said estates, payable to certain trustees for the portion or portions of the younger children of the intended marriage; and that C. J. K. Tynte was desirous of settling and securing to V. Brabazon a further and additional jointure or rent-charge of 1200*l.* per annum, making with the said rent-charge or annuity of 800*l.* a clear yearly rent-charge of 2000*l.*; and that the said additional annuity of 1200*l.* might be charged upon and issuing out of certain estates in the counties of Somerset, Monmouth, Glamorgan, and Brecon, to which C. J. K. Tynte would become entitled on the

death of his father; and C. J. K. Tynte was also desirous of charging the same estates (subject to the said jointure) with the sum of 10,000*l.* as additional portions for the younger children of the said intended marriage, in case there should be more than two such younger children: It was witnessed that, in consideration of the said intended marriage and of all and singular other the premises, C. J. K. Tynte "doth by these presents charge and make chargeable all and singular the said estates, hereditaments, and premises in the said counties of Somerset, Monmouth, Glamorgan, and Brecon with the payment of the said yearly rent-charge or sum of 1200*l.* unto the said V. Brabazon during her life, and also with the payment to the trustees for the time being of the said in part recited settlement of the said sum of 10,000*l.* as additional portions for the younger children of the said intended marriage, in case there should be more than two such younger children; and the said yearly rent-charge or sum of 1200*l.* shall be paid and payable at such and the same days and times and in such and the same
* 560 manner * and with such and the same powers for the recovery thereof as the said yearly rent-charge or annuity of 800*l.* is secured and made payable in and by the said in part recited indenture of settlement; and in case the said marriage shall take effect, and there shall be more than two such younger children, then the said sum of 10,000*l.* hereby charged upon the said estates and hereditaments in the said counties of Somerset, &c., as additional portions for such younger children, shall be raised and taken up at such times and by such ways and means and in all respects in such manner as is contained in the said indenture of settlement as to the sum of 10,000*l.* thereby provided for the portions of the younger child or children of the said intended marriage." Then by a further witnessing part C. J. K. Tynte covenanted with Mrs. Brabazon, that if the marriage should be solemnized, "he the said C. J. K. Tynte shall and will immediately he shall be entitled to the possession of the estates and hereditaments hereinafter mentioned, or as soon afterwards as conveniently may be, at his own costs and charges, by such good and sufficient conveyances and assurances in the law as the trustees for the time being of the said in part recited indenture of settlement or their or any of their counsel in the law shall require, advise, or direct and tender to be made and executed, convey and assure all and singular the said estates and hereditaments in the said counties of Somerset, Mon-

mouth, Glamorgan, and Brecon, and all other the hereditaments to which he the said C. J. K. Tynte now is or hereafter shall or may be seised or entitled for any estate of freehold or inheritance in possession, reversion, remainder, or expectancy, together with their and every of their appurtenances, unto them the said trustees for the time being of the said in part recited indenture of settlement, to such uses, upon such trusts, for such estate and estates, and for such intents and purposes, and subject to such powers, provisos, * and declarations, for the purpose of securing the said * 561 additional rent-charge or annuity of 1200*l.* and the said additional sum of 10,000*l.* for younger children's portions, in case there should be more than two such younger children, as are expressed and contained in the said indenture of settlement of and concerning the said original rent-charge or annuity of 800*l.*, and the said original sum of 10,000*l.* thereby provided for the portion or portions of the younger child or children of the said intended marriage."

This last deed was prepared by a solicitor who was not the family solicitor.

Colonel Tynte, the father, died in 1860. The son having created divers incumbrances to a very large amount on his life-estate, different suits were instituted by different incumbrancers for the purpose of enforcing their charges. Inquiries as to incumbrances having been directed, a claim under the last-mentioned deed was carried in by the wife and younger children of C. J. K. Tynte, and disallowed by Vice-Chancellor Wood, who held that it was not the intention of the parties to the deed that it should affect the income of the estate during C. J. K. Tynte's life, and that although, if held not to affect the life-estate, it could have no effect at all, it could not, in order to give it some effect, have an effect given to it which was contrary to the intention of the parties. The wife and children appealed.

Mr. W. M. James, *Mr. Briggs*, and *Mr. Miller*, for the appellants. — The question is whether, when a person has for valuable consideration agreed to charge an estate with sums not payable until after his death, the charge is to be wholly void, because it turns out that he was only a * tenant for life when he * 562 made the charge. If I charge a property with the payment of a debt payable without interest ten years hence, am I to be at

liberty to say that the charge is good for nothing, because my only interest in the property is a term of nine years? We contend, that if the charge cannot have effect given to it *modo et formâ*, it should be enforced in the best way it can. The covenant is to assure to the trustees all property to which C. J. K. Tynte is entitled for any estate, and effect ought to be given to it against the life-estate. There is no practical difficulty in securing the jointure, for it is only a contingent interest for the life of the wife, if she survives her husband, and a very small yearly premium would secure it from an insurance company. There is right to relief on the ground of misrepresentation, as in *Teasdale* v. *Teasdale*, (*a*) *Monypenny* v. *Monypenny*. (*b*) There is not here a mere agreement, not creating a present charge, as in *Lady Mornington* v. *Keane*. (*c*)

Mr. Rolt and *Mr. Renshaw*, for the plaintiff Ford. — The appellants contend that the Vice-Chancellor refused to give effect to the charge, because the machinery for working it out failed; but the Vice-Chancellor considered that the proposed mode of working it out was not mere machinery, but part of the substance of the agreement. The intention of the parties was to make a charge in all respects similar in its incidents to that in the settlement, — a charge affecting the fee, but not affecting it so as to interfere with the settlor during his life. The parties to the deed threw their net as wide as they could to catch any thing C. J. K. * 563 Tynte * had which could be so charged. They have caught nothing; but that is no reason why the deed should now have an effect given to it quite contrary to their intention, that it may not fail of having any affect. The money cannot be raised during the settlor's life contrary to the intention. *Lawton* v. *Swetenham*. (*d*)

Sir H. M. Cairns and *Mr. Beavan*, for another incumbrancer. — The question between us and the appellants is solely one on the construction of the instrument, we being not concerned with any personal equity the appellants may have against C. J. K. Tynte on the ground of misrepresentation or otherwise. It is most improb-

(*a*) Sel. Ch. Ca. 59; 2 White & Tudor's Leading Cases, 21.
(*b*) 9 H. L. Cas. 114.
(*c*) 2 De G. & J. 292.
(*d*) 18 Beav. 98.

able that he should intend to have his life-interest impounded, and the deed shows he did not. It does not show him to be tenant for life; and the scope of the deed is to add to the former charges additional charges, taking effect in the same way, and not affecting the estates till after his death. To impound the rents would be making a new contract for the parties.

Mr. Cole and *Mr. Kay*, for another incumbrancer. — The contention of the appellant is opposed to all the doctrines of the Court as to jointures and portions. *Lewis* v. *Madocks*, (*a*) *St. Aubyn* v. *Humphreys*, (*b*) are both opposed to impounding a life-interest in the way attempted.

Mr. Kingdon, for the representatives of another incumbrancer. — A covenant of this kind is to be construed strictly: * *Smith* v. *Osborne*; (*c*) and the Court will never * 564 construe it so as to effect what the parties did not intend. *Duke of Bedford* v. *The Trustees of the British Museum.* (*d*)

Mr. James, in reply. — There are three cardinal rules of construction which are decisive of the present question. 1. Every instrument is to be construed *ut res magis valeat quam pereat.* Now, here an intention is expressed to provide a jointure and portions, whereas, if the argument of the respondents is correct, the deed does nothing at all. 2. The Court must put itself into the place of the grantor, and look at all the circumstances. Here the circumstances are, that there was a disentailing deed, almost contemporaneous with the deed under which we claim, giving him nothing but a life-estate, and with respect to that life-estate he must be supposed to have contracted. 3. Every person who executes a deed must be supposed to know the contents and effect of other deeds which he has executed. This deed must, therefore, be construed as if the disentailing deed had been fully recited in it.

THE LORD JUSTICE KNIGHT BRUCE. — Whether, if any fraud or misrepresentation upon the part of Mr. Charles John Tynte, in the transaction of 1849 or connected with it, had been proved, that

(*a*) 17 Ves. 48.
(*b*) 22 Beav. 175.
(*c*) 6 H. L. Cas. 375.
(*d*) 2 M. & K. 552.

would have been material in the present controversy, I need not say, for there does not appear to be any such proof. The instrument in question must be taken, I think, according to its tenor, and appears to me not to create or confer any lien or charge on the life-interest of Mr. Charles John Tynte in any part of the
* 565 property purporting * to be affected by it. Certainly, I apprehend, it gave no right to appropriate or impound any rents that might accrue during his life, for the purpose of satisfying or securing either the additional jointure or the additional portions, which could not commence or be payable before his death. There was not any contract expressed or implied for the purpose; and, as I have said, there does not seem to have been any misrepresentation or fraud. The Vice-Chancellor's conclusion appears to me right.

THE LORD JUSTICE TURNER. — I am of the same opinion. This deed, which as the Vice-Chancellor has observed is a very singular one, divides itself into two parts. The first part purports to create a charge, and the second part purports to operate by way of covenant. I will first consider this second part. [His Lordship read the covenant.] *Mr. James* very ingeniously in arguing the case stopped short in this covenant, treating it as a covenant to make such conveyance as the trustees for the time being shall advise or require to the trustees. But the covenant is to make such conveyance as the trustees for the time being shall advise or require to the trustees to certain uses, and those uses are uses which cannot possibly arise during the lifetime of Colonel Tynte. It is clear, therefore, to my mind, that, so far as the case of the covenant is concerned, it is impossible, by virtue of that covenant, to fix any lien on the life-estate of Colonel Tynte. The covenant cannot apply to any life-estate in him, inasmuch as such an estate could not be conveyed to uses which are to arise only after his death.

The case, therefore, if it be maintainable at all, must
* 566 * be maintained upon the earlier part of the deed which purports to create a charge. Now, on that part of the deed, I think the argument goes too far, in dividing and separating the words purporting to create the charge from the words which show what is to be charged, and how the charge is intended to take effect. I think that the whole must be taken together. The deed purports to charge the estates with the payment to the wife of the

additional jointure, to be paid and payable at such and the same days and times and in such and the same manner and with such and the same powers for recovery thereof as the rent-charge of 800*l.* was secured and made payable by the settlement. There is a similar reference to the original settlement as to the time and manner of raising the 10,000*l.* for additional portions. Was it then the intention of the parties to this deed to charge the life-interest, or was their intention to charge the *corpus* of the estate? I think it is perfectly clear that the intention was to charge the *corpus* of the estate. But then it was urged that, as Colonel Tynte was only tenant for life, and therefore could not charge the *corpus* of the estate, the Court will carry into effect the charge against his life-estate. But if he has purported by the deed to create a charge which he had no power to create, that does not to my mind present any reason for construing the deed so as to do what was not intended to be done. If it be clear upon the face of the deed that the intention was to charge the *corpus* only, without in any degree affecting the life-estate, the mere fact that he could not charge the *corpus* does not, to my mind, convey any right to have done what was not done or contracted to be done or contemplated to be done; namely, to have a charge enforced against the life-estate. What we are asked to do here is, not to give effect to what was contemplated by the deed, namely, a charge upon
* the estate, but to do something of an entirely different * 567
nature, to impound the life-interest for the purpose of creating a fund which is to be applied in payment of the annuity, if the annuity should become payable, and in payment of the 10,000*l.*, if the 10,000*l.* should become payable. There is much force in the argument which has been brought forward by *Mr. Cole* upon that question, and also in the considerations which arise from the rule, that portions for children are never to be considered as payable during the lifetime of the parents, unless there is a clear manifestation of an intention to that effect. Upon these grounds I am satisfied that, upon the true construction of this deed, the intention was to charge the *corpus*, and the *corpus* only, exclusive of the life-estate, and that the covenant does not apply to the life-estate, and therefore that this appeal cannot be maintained.

*568 *LLOYD *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

1865. April 20, 21, 26. Before the LORDS JUSTICES.

A railway company bought land from the plaintiff, and in the purchase-deed covenanted with him not to erect any building upon it to a greater height than eighteen feet within the distance of eighty feet from certain other property of his. At the time of the conveyance the railway had been carried through the purchased land with two lines of rails on a viaduct thirty-three feet high, part of which was within eighty feet from the protected property. The company afterwards determined to widen their railway, so as to have four lines of rails, and commenced building on the purchased land, for the purpose of widening the viaduct, piers more than eighteen feet high, and standing within eighty feet of the protected property and between it and the old viaduct: *Held*, by the Lord Justice TURNER, affirming the decision of Vice-Chancellor KINDERSLEY, the Lord Justice KNIGHT BRUCE dissenting, that they ought to be restrained from so doing.[1]

THIS was a motion on the part of the defendants, the London, Chatham, and Dover Railway Company, to discharge an Order made by the Vice-Chancellor KINDERSLEY on the 9th of February, 1865, granting an injunction to restrain them, their servants, workmen, and agents, from continuing to erect the piers in the plaintiff's bill mentioned within the limits of eighty feet from the plaintiff's premises of a greater height than eighteen feet, and the motion asked also that the injunction might be dissolved.

In the year 1860, the company applied to Parliament for powers to make a railway extending their communications with the metropolis. The line of the proposed railway was to pass through the estate of the plaintiff. The plaintiff opposed the bill introduced by the railway company in Parliament, and thereupon an agreement dated the 16th of April, 1860, was come to between the plaintiff and the company, by which, reciting that the company would, if

[1] See 2 Dan. Ch. Pr. (4th Am. ed.) 1654, and note (4), and cases cited; Western *v.* Macdermott, L. R. 2 Ch. Ap. 72; Linzee *v.* Mixer, 101 Mass. 512; Peek *v.* Matthews, L. R. 3 Eq. 515; Whitney *v.* Union Railway Co., 11 Gray, 359; Schwoerer *v.* Boylston Market Association, 99 Mass. 285; Parker *v.* Nightingale, 6 Allen, 341; Coles *v.* Sims, 5 De G., M. & G. 1, and cases in note (2); Piggott *v.* Stratton, 1 De G., F. & J. 33; 1 Joyce Inj. 90–92; Kerr Inj. 504; 2 Sugden V. & P. (8th Am. ed.) 596, and note (*m*), and cases cited, 597.

the bill became law, take or injuriously affect so much and such parts of the land of the plaintiff as were coloured red in the plan annexed to the agreement, and that it would, as it was alleged, injuriously affect so much and such parts of the * plaintiff's *569 property as were coloured blue and yellow in the plan, it was agreed that it should be referred to certain persons therein named, or their umpire, to ascertain and fix the value to be set upon the property which was coloured red, and the damages to be paid for the injury which would be occasioned to the property which was coloured blue and yellow.

The property coloured yellow on the plan was an oblong strip of land of uniform depth running north and south, and containing a row of houses in Nelson Square, with small yards at the back. The property coloured red lay to the east, and adjoined the back of these yards along more than two-thirds of the length of the property coloured yellow. The blue property was a smaller piece of land containing one house in Nelson Square, adjoining the northern end of the property coloured yellow. This piece of land reached further back than the yellow property, and ran along that part of the back of the yellow property behind which the red did not extend.

After the provisions for ascertaining the purchase-money and compensation, the agreement contained the following clause:—

"And it is hereby further agreed and declared between and by the said parties hereto, that on the site of the hereditaments, lands, and premises coloured red as aforesaid no building except the said railway shall be erected, nor any trade or occupation carried on which shall become a nuisance, annoyance, or injury to the said H. E. L. Lloyd, or his assigns, tenants, or undertenants, and that no building, roof, or part of any building, except as aforesaid, shall be erected thereon within eighty feet from the back part of any of the dwelling-houses and premises coloured blue and yellow in the said plan of a greater height from the ground than eighteen feet, and * that no chimney shall be built of a less height *570 than 100 feet from the surface of the ground nor within eighty feet from the back part of any of the said dwelling-houses and premises, and that no window, skylight, or opening shall be made in any wall or roof looking towards Nelson Square within eighty feet from the said back part of any of the said dwelling-

houses and premises coloured blue and yellow, and that the referees or umpire by whom the compensation to be made to the said H. E. L. Lloyd shall be fixed shall direct what (if any thing) shall be further done by the company to protect the said H. E. L. Lloyd, his heirs and assigns, from present and future loss, damage, and injury to his and their remaining property beyond the loss, damage, and injury to be the subject-matter of such compensation. And it is hereby further agreed and declared between and by the said parties hereto, that the said company shall not take any part of the said lands and hereditaments coloured blue, and that the centre line of the railway laid down in the plans deposited with the clerk of the peace shall not be deviated from in passing through or over the property of the said H. E. L. Lloyd."

This agreement having been entered into between the plaintiff and the company, the company obtained their Act of Parliament. By the Act they had powers to take land sufficient for laying down four lines of railway. The land coloured red in the agreement entered into between the company and the plaintiff was sufficient for the purpose of laying down these four lines of railway; and under the powers given to them by the Act the company purchased from some other persons sufficient land for the purpose of laying down along their whole line four lines. The company thereupon proceeded to make the railway. They laid it down in parts at some small distance to the north of the plaintiff's property
* 571 in four * lines, but through the plaintiff's estate, and for some short distance north and for some considerable distance south of the plaintiff's estate, they laid it down upon two lines only, and it appeared upon the evidence that in the proceedings which were had before Parliament for the purpose of the company obtaining the Act the estimates were had for two lines only along a great part of the line, including that part of it which extended through the plaintiff's estate. In January, 1863, there was a further agreement between the plaintiff and the company, which modified the former agreement by fixing the sums to be paid for purchase-money and compensation at 8916*l.* and 484*l.* respectively, instead of their being ascertained by arbitration, but expressly left the other clauses of that agreement in force.

About the end of March, 1863, the solicitors of the company sent to the plaintiff's solicitor the draft of a conveyance of the

pieces of land coloured red referred to in the agreement of 1860, along with some other property not mentioned in that agreement. In this draft it was recited, that "the company, having occasion to take and use the several pieces of ground and hereditaments hereinafter described and intended to be hereby assured for the purpose of their undertaking (Metropolitan Extension), have under the powers of their special Acts of Parliament and the Acts incorporated therewith, or some of them, contracted with the said H. E. L. Lloyd for the absolute purchase thereof free from all incumbrances, and the said H. E. L Lloyd has agreed to accept and the company has agreed to pay the sum of 10,711*l.* in full satisfaction and discharge as well of the purchase-moneys of the pieces of ground and hereditaments as of all claims, right, or title of the plaintiff under any circumstances, or in any event, to resume or assert any estate, claim, or interest whatsoever in, to, or in respect of *the same piece of ground and hereditaments, *572 or any of them." When the draft conveyance reached the plaintiff's solicitor he made a material alteration in it by striking out so much of the above recital as follows the words "free from all incumbrances," and substituting for them the words, "but subject to the interest of Louisa Margaret Watkins as lessee of part thereof, and to the covenant of the company hereinafter contained with respect to the use by them of the said hereditaments," and by inserting at the close of the draft this covenant on the part of the company with the plaintiff: —

"And the said company do hereby for themselves, their successors, and assigns, covenant with the said H. E. L. Lloyd, his heirs and assigns, that they the said company, their successors, or assigns, will not at any time hereafter erect or permit to be erected on the hereditaments and premises hereinbefore expressed to be hereby granted, or any part thereof, within eighty feet from the back part of the premises and hereditaments situate on the west and north sides of the said premises, and now the property of the said H. E. L. Lloyd, any building or erection whatsoever of a greater height than eighteen feet from the surface of the ground, or erect or permit to be erected upon any part of the said premises whatsoever any chimney of a less height than 100 feet from the surface of the ground, or carry on or permit to be carried on on the said premises or any part thereof any trade or business whatsoever which shall

be or become a nuisance, annoyance, or injury to the said H. E. L. Lloyd, his heirs or assigns, or his or their tenants, or make or permit to be made in any building on the said premises erected or to be erected within eighty feet from the back of the messuages and hereditaments on the west side of the said premises any
* 573 window, skylight, or other opening whatever looking on * or towards such last-mentioned messuages and hereditaments."

Ultimately, the draft having been altered in this way, the conveyance was prepared and settled in conformity with the draft as altered on behalf of the plaintiff and containing the above covenant, and was executed on the 29th of June, 1863. It will be observed, that the agreement was, that there should be no erection except the railway, but that in the covenant contained in the deed there was no such exception of the railway. The railway, in fact, was at that time, if not completed, at all events very nearly completed for two lines, and it passed through this property upon a viaduct admitting only of two lines of railway, which were actually made. Some part of this viaduct stood within eighty feet of the back of the plaintiff's property.

Shortly before this bill was filed the company became desirous of laying down, through the property which they had thus purchased from the plaintiff, the four lines of railway. The land purchased from the plaintiff under the agreement of 1860 was, as above stated, wide enough for four lines, and they had purchased from other parties a sufficient extent of land to enable them to lay down the four lines of railway in the other parts of their line where they had not yet been laid down, and they began to take proceedings for that purpose; and, in order to do so, they began to erect on the land which had been sold and conveyed to them by the plaintiff as mentioned above, works for the purpose of widening the viaduct, which was necessary in order to lay down the four lines of railway. The commencement of the works was building pillars above the height of eighteen feet (the height of the railway being about thirty-three feet) on the western side of the railway, and
* 574 within eighty feet from * the plaintiff's property in Nelson Square. Upon these proceedings being taken by the company this bill was filed for an injunction, and Vice-Chancellor KINDERSLEY granted an injunction in the terms stated above.

Mr. Rolt and *Mr. Kekewich*, for the appellants. — We say, that widening our line is not erecting a building within the meaning of the covenant, and that there is therefore no breach at all. The context qualifies the meaning of the word "building." The agreement of 1860 says, "building except the railway," but the conveyance omits those words of exception, evidently because it was not intended to treat the railway as a building. If, however, the covenant is to be construed as the plaintiff contends, the case is one of mistake. Moreover, the plaintiff must be taken to have waived it by his acquiescence in the construction of the railway. The effect of this injunction, if maintained, will be to prevent the completion of the wider line altogether, for the company are not allowed by their Act to make any deviation from the central line of the railway, and unless they can widen on this side they cannot widen at all. The Act recites the great public importance of the undertaking, and it is against public policy that it should be stopped when damages would be an ample compensation. The case is peculiarly one in which the plaintiff ought to be left to his remedy at law, the amount of damage not being serious.

Mr. Glasse and *Mr. Eddis*, for the plaintiff. — The meaning of the covenant is, we contend, clear, and the breach of it manifest. The words "except the railway," which occur in the agreement, were omitted from the conveyance, because in the interval the railway had been built up and there was no occasion to except a building which was already existing from a covenant *not to erect buildings. It is not as if the covenant had *575 been not to keep any buildings there, then the exceptions would have been necessary. As to the damage being trifling, that is not so; but, if it were, the Court would not look into that in a case depending on contract as it would in a case of mere trespass. *Tipping* v. *Eckersley*, (*a*) *Dickinson* v. *Grand Junction Railway Company*, (*b*) *Rochdale Canal Company* v. *King*. (*c*) In the case of a negative covenant the Court will enforce it, though the damage may not be very serious.

Mr. Kekewich, in reply.

Judgment reserved.

(*a*) 2 K. & J. 264. (*b*) 15 Beav. 260, 270. (*c*) 2 Sim. (N. S.) 78.

April 26.

The Lord Justice TURNER, after stating the facts of the case in nearly the same terms as above, proceeded as follows: —

The first question we have here to consider is, whether what is proposed to be done by the company is or is not a breach of the covenant contained in the deed. The defendants (the company) contend that it is not, and that the railway is not a building within the meaning of the covenant. I think it is quite impossible, *primâ facie* at least, to say that a viaduct is not a building, and the covenant extends to any building; therefore, independently of any context in the deed controlling the effect of the word "building," it would be clear that there is a breach of the covenant. It is said, however, that the context of this deed controls the meaning of the word "building" as contained in the covenant, and it be-
* 576 comes necessary therefore to look at * the whole of the covenant to see whether that argument is well founded, and whether we can say that upon the true construction of this covenant a viaduct is not a building within its meaning. The defendants covenanted with the plaintiff, first, that they would not at any time thereafter erect or permit to be erected on the hereditaments and premises thereinbefore expressed to be thereby granted or any part thereof, within eighty feet from the back part of the premises and hereditaments situate on the west and north sides of the said premises, and then the property of the plaintiff, any building or erection whatsoever of a greater height than eighteen feet from the surface of the ground; and secondly, that they would not erect or permit to be erected upon any part of the said premises whatsoever any chimney of a less height than 100 feet from the surface of the ground.

I will deal, first, with the covenant as to the chimney. It is true that the covenant not to build above eighteen feet from the surface of the ground would in itself prevent an erection of a chimney, but it would prevent it only within eighty feet. Now the covenant as to the chimney extends not merely to the eighty feet, but to any part of the premises, "or erect or permit to be erected upon any part of the said premises whatsoever any chimney of a less height than eighty feet." This part of the covenant, therefore, is not in any way inconsistent with a railway being a building within the meaning of the covenant.

The second branch of the second part of the covenant on the part of the defendants, is, that they would not carry on or permit to be carried on on the said premises, or any part thereof, any trade or business whatsoever which should be or become a nuisance, annoyance, or injury to the plaintiff, his heirs or assigns, * or his or their tenants. This has nothing to do *577 with building, and may be left out of the case, it is merely a covenant not to cause a nuisance.

The third part is this: that they will not "make or permit to be made in any building on the said premises erected or to be erected within eighty feet from the back of the said messuages and hereditaments on the west side of the said premises any window, skylight, or other opening whatsoever looking on or towards such last-mentioned messuages and hereditaments." This is a covenant which would extend to buildings of a less height than eighteen feet, and I therefore do not think that it is in any way inconsistent with the covenant not to erect any building whatsoever of a greater height than eighteen feet. Every part of the covenant, therefore, seems to me to be consistent with the plaintiff's case, and with the view that the company were to be prohibited from erecting the viaduct in question. Any doubt there might possibly be on this part of the case seems to me to be removed entirely by the facts. It is clear throughout the case that the railway has been treated as a building. The terms of the agreement are, that they will not erect any building except the railway, and which imports that the railway is in itself a building. It is clear, therefore, beyond all doubt, in my view of the case, that a breach of covenant is proposed and confessed to be proposed on the part of the company.

It is said, however, that this Court ought not to interfere to restrain this breach of covenant on several grounds.

First. It is said that there has been a mistake on the part of both parties, and that it was never intended by * this *578 covenant to prevent the widening of the railway or the building of the railway so as to widen it for the purposes required by the company. Looking to the facts, and looking to the case as it stood on the agreement and as it stands on the deed, it is exceedingly difficult, in my opinion, to suppose that there could by possibility have been any mistake. In the agreement we find an express provision not to erect any building except the railway, and in the deed we find an omission of these words, "except the rail-

way." It is not, however, I think, necessary to enter into the question whether there was or not a mistake here. If there be a mistake, it is upon the company to proceed to rectify it, and they have not done so; and we must act on the deed as it stands while it stands and is in force.

Another ground of objection taken is that the plaintiff has waived this covenant because it is said that some part of the viaduct already made for the two lines is erected above the height of eighteen feet and within the distance of eighty feet of the premises to be protected by the company. I certainly am not prepared to go the length of saying that, because the plaintiff may have permitted one infringement of the covenant, he is bound to permit every infringement which may be adopted by the company.[1]

Another ground of argument on the part of the company against the interference of this Court, was, that according to the provisions of the Act of Parliament the centre line of the railway is not to be deviated from, and that if the company are prevented from completing the railway as proposed, that is to say, making the four lines, that stipulation in the Act cannot be complied with. The answer, I think, to that argument is, that this is the
*579 * company's own act. If they have so made their existing works as that the stipulations contained in the Act cannot be complied with, the consequences must be on them, and not on the plaintiff.[2]

A further argument in support of the company's view of the case was, that this is a matter of great public importance, and they rely very much upon the recital in the Act, which would certainly go to show that there were great public interests involved in and attached to this question. If this covenant be at law a valid covenant, and I have heard no argument to the contrary, nor do I see any reason for saying it is not a valid covenant, then I cannot see any ground upon which the Court can say that a covenant which is valid at law shall not be capable of being enforced in equity. If the other circumstances of the case be such that this Court would enforce the covenant independently of the particular public importance or public policy which attaches to the question, and a Court of Law would hold the covenant to be valid, this Court ought not

[1] See Western *v.* Macdermott, L. R. 2 Ch. Ap. 72; Linzee *v.* Mixer, 101 Mass. 512; Peek *v.* Matthews, L. R. 3 Eq. 515; Kerr Inj. 496, 497.

[2] See Kerr Inj. 17, 18; Dutton *v.* Furness, 35 L. J. Ch. 463.

to be prevented by considerations of public policy from proceeding to enforce it.[1]

The last and most serious argument pressed on the part of the company was this: That this is a case in which the plaintiff should be left to his remedy at law by damages. Now I have given a great deal of consideration to that part of the case, and my opinion is, that it is not a case in which this Court ought to repudiate its jurisdiction to enforce specific performance of the covenant. This covenant is part of the contract between the plaintiff and the company. The plaintiff has sold the land at a price subject to the covenant, and I do not think that this Court ought to say or can say that the plaintiff would not have demanded or received *a larger price if this covenant had not been inserted in *580 the conveyance. The plaintiff may well say, "but for this covenant I should have demanded a larger sum."

Whether there may be cases in which it is so clear that the damage to arise from breach of a covenant would be inappreciable, that this Court would, on that ground alone, refuse its interference, I am not prepared to say. Possibly there may be such cases, but, in my opinion, such cases, if such there be, must be free from doubt. It must be clear that there is no appreciable, or, at all events, no substantial damage, before this Court would, merely on the ground of the smallness of the damage, withhold its hand from enforcing the execution of the covenant.[2] The evidence before us certainly does not satisfy me that this is such a case.

There is, I think, another ground for not leaving the plaintiff to his remedy at law on the covenant; namely, that the extent of the damage may not at present be capable of ascertainment. On the whole case, therefore, I agree with the Vice-Chancellor in the order he has made, and I am of opinion that this appeal should be dismissed. If the case be, and I am far from saying it is not, of great public importance, it is, in my opinion, for Parliament, and not for us, to interfere. The legislature has the means, which we have not, of making such provisions as will meet the justice of the case.

[1] See Raphael *v.* Thames Valley Railway Co., L. R. 2 Eq. 37; L. R. 2 Ch. Ap. 147; 2 Joyce Inj. 817; Foster *v.* Birmingham, Wolverhampton, & Dudley Railway Co., 2 W. R. 378; Kerr Inj. 533.

[2] See Kerr Inj. 200, 532; 2 Joyce Inj. 910; 2 Dart V. & P. (4th Eng. ed.) 709.

THE LORD JUSTICE KNIGHT BRUCE. — Without giving an opinion upon the construction of the covenant in question, with regard to the meaning of the word "erection" or the word "building" *581 as extending *or not extending to the railway itself, I assume that point in the plaintiff's favour; but so treating it, I apprehend that the covenant must be looked upon as one of such strange imprudence, and that the injunction which has been sought and obtained in the case must necessarily cause directly such a great amount of evil and loss to the defendants as to their private interests, and such a very serious amount of inconvenience and mischief to the public, that the injunction ought not to stand, at least if the damage to the plaintiff, by means of the defendants' intended works, is susceptible of pecuniary compensation, as I think that it is; and I am of opinion accordingly that the matter should be left to law, and that the injunction should be dissolved without prejudice to any action that the plaintiff may bring, so that he may be at liberty to sue the defendants at law as he may be advised. But my learned brother concurring with the learned Vice-Chancellor in a different view, that view must prevail here.

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*582 *GREENFIELD *v.* EDWARDS.

1865. May 3, 5, 6, 8. Before the LORDS JUSTICES.

W., a solicitor, being indebted to E., and being pressed for payment or further security, proposed to give him a second mortgage on the G. estate. This estate had been bought in the name of the plaintiff, who was, however, only a trustee for W., a fact which did not appear on the deeds. The proposal being acceded to, W. sent to E.'s solicitors the draft of a mortgage-deed, which was in the common form of a mortgage from the plaintiff to E. for money advanced at the time. This draft being approved by E.'s solicitors, the deed was engrossed, and was executed by the plaintiff and handed to W., who delivered it to E., no communication taking place between E. or his solicitors and the plaintiff. The security of the estate having proved deficient, E. sued the plaintiff on the covenant in the deed, and the plaintiff thereupon filed a bill to be relieved, on the ground that he had been defrauded by W. into executing a deed containing a covenant to pay.

Held, that E. was not bound to inquire whether the plaintiff, who was not the

real borrower, had agreed to enter into a covenant for payment, and that the frame of the deed did not affect E. with notice of any fraud that might have been practised by W. in inducing the plaintiff to execute such a deed.[1]

THIS was an appeal by the defendant F. Edwards from a decree of Vice-Chancellor STUART granting a perpetual injunction against his suing the plaintiff on the covenant for payment contained in a mortgage-deed.

The first six paragraphs of the bill, which were read *in extenso* by the Lord Justice KNIGHT BRUCE in giving judgment, were as follows: —

"1. In and for some years prior to the year 1855, the above-named John Charles Williams (who is a solicitor of this Honourable Court) was and had been a member of a firm of solicitors carrying on their business at No. 3, Lancaster Place, Strand, in the said county of Middlesex, and at King's Lynn, in the county of Norfolk, under a partnership name or style of 'Goodwin & Co.' The members of the said firm were Charles Goodwin (now deceased) Frederick Robert Partridge, Henry Edwards, and the said defendant John Charles Williams. The said defendant John Charles Williams resided at or in the neighbourhood of London, and managed and transacted the business of the said * firm at its said London offices; the other three members * 583 of the said firm resided at or in the neighbourhood of King's Lynn aforesaid, and managed and transacted the business of the said firm at its said country offices.

"2. The said firm of Goodwin & Co. was one of large business and of the highest respectability. The said defendant John Chas. Williams was considered by the plaintiff, and as he believes by all other persons to whom he was known, to be a man of the strictest honour and integrity; the said defendant John Chas. Williams is a connection of the plaintiff's, having married a cousin, and is considerably his senior, and the plaintiff reposed implicit confidence in him.

"3. In or about the year 1855 the said defendant John Chas. Williams informed the plaintiff that a client of his named Henry Ernest had contracted for the purchase, from a person named Edgar, of a considerable estate in the counties of Glamorgan and

[1] See note (1), *post*, 596; and notes (1) and (2), *post*, 598.

Carmarthen, in South Wales, and containing or supposed to contain minerals of great value, hereinafter called 'The Welch Estates,' and of which estate the hereditaments hereinafter particularly mentioned and referred to as the 'Glyn Abbey Estate' formed part, and that for some reason it was considered desirable that the said estates should not be conveyed to the said Henry Ernest himself, but to some other person as a trustee for him, and he requested the plaintiff to become and to allow his name to be used as such trustee. The said defendant John Chas. Williams assured the plaintiff that if he became such trustee, he would not incur the slightest responsibility or liability, and the plaintiff, confiding in those assurances, consented to allow his name to be so used, and the conveyance next hereinafter mentioned was accordingly executed.

*584 *"4. By an indenture bearing date the 21st day of August, 1855, and expressed to be made between Lucy Edgar, spinster, and Joseph Haythorne Edgar, gentleman, of the one part, and the plaintiff of the other part, in consideration of the sum of 7000*l.* due and owing to one John Anthony Partridge under an indenture of mortgage dated the 11th day of July, 1853, therein recited, and of the sum of 3000*l.* due and owing to Beata Blandford Burgess and Laura Burgess under an indenture of mortgage dated the 12th day of July, 1853, therein also recited, and of the covenant of the plaintiff for the payment thereof and of the interest thenceforth to become due for the same sums respectively thereinafter contained, and in consideration of the sum of 300*l.* to the said Lucy Edgar therein stated to have been paid by the plaintiff, the receipt of which was thereby acknowledged, the said Lucy Edgar and Joseph Haythorne Edgar granted and confirmed unto the plaintiff, his heirs and assigns, all and singular the capital and other messuages, farms, mills, cottages, lands, tenements, and other hereditaments situate in the parish of Llangandiern, in the county of Carmarthen, particularized in the schedule thereunto annexed and further described in the map or plan delineated in the fourth skin thereunto also annexed, to hold the said hereditaments and premises unto and to the use of the plaintiff, his heirs and assigns for ever, subject to any agreement for a lease under which the same or any part or parts thereof were or was held by the tenants or occupiers thereof, and subject to the said mortgage securities to the said John Anthony Partridge and

the said Beata Blandford Burgess and Laura Burgess respectively, and to the principal sums of 7000*l.* and 3000*l.* thereby respectively secured, and to the interest thenceforth to become due on the same sums respectively. And, in consideration of the premises, the plaintiff is thereby stated, for himself, * his heirs, executors, * 585 and administrators, to covenant with the said Lucy Edgar and Joseph Haythorne Edgar, and each of them, their, and each of their heirs, executors, and administrators, to bear and pay the said principal sums of 7000*l.* and 3000*l.* so due and owing to the said John Anthony Partridge and Beata Blandford Burgess and Laura Burgess respectively as aforesaid, and the interest thenceforth to become due for the same sums respectively; and from and against the same principal moneys or either of them, and the interest thereon respectively, and all actions, suits, proceedings, costs, charges, damages, and expenses (if any) to be brought, commenced, taken, had, incurred, or sustained for or on account or by reason, or in consequence of the non-payment thereof or of any part thereof, or in any wise relating thereto or to any part thereof, to save, defend, and keep harmless and indemnified the said Lucy Edgar and Joseph Haythorne Edgar, and each of them, and the heirs, executors, and administrators of one Joseph Edgar deceased, and his and their estates and effects whatsoever and wheresoever.

"5. The plaintiff did not pay the sum of 300*l.* expressed by the said indenture to be the consideration paid by him for the conveyance thereby made or any part thereof, or any other sum, nor was he aware of the mortgages for 7000*l.* and 3000*l.* therein recited or either of them, or of the covenants respecting them on his part contained in the said indenture. The indenture itself was in fact, as the plaintiff believes, executed a considerable time after its date, but when precisely the plaintiff does not remember.

"6. The plaintiff after the execution of the said last-mentioned indenture, at the request of the said John Charles Williams, and upon his representation that they were merely formal acts, not imposing upon the plaintiff * any responsibility or lia- * 586 bility, from time to time executed various deeds and documents relating to the said estates or parts thereof, and amongst others, as he has now discovered, an indenture of mortgage to the above-named defendant Frederick Edwards, dated the 1st day of December, 1856, to secure 3400*l.* upon parts of the said estates as

hereinafter mentioned. The plaintiff, however, was not aware at the time he executed such deed that he was executing a mortgage of any part of the said estates."

The 37th paragraph was as follows:—

The plaintiff believes that the defendant Frederick Edwards is a gentleman of great respectability, and he does not desire to impute actual fraud, in the obtaining the said mortgage from the plaintiff, to him or to his said solicitors or either of them; but the plaintiff is advised and humbly submits that the obtaining or taking from him of a personal covenant to pay the mortgage debt and interest, without disclosing to the plaintiff the circumstances hereinbefore stated, was inequitable and fraudulent according to the law of this Honourable Court, and disentitles the said defendant to sue the plaintiff upon his covenant to pay the said sum of 3400*l.* and interest contained in the said mortgage.

It appeared further from the statements of the bill, that by an indenture dated the 23d of August, 1856, made between J. A. Partridge of the first part, B. B. Burgess and Laura Burgess of the second part, the plaintiff of the third part, and Charles Goodwin, F. R. Partridge, and E. E. Durrant of the fourth part, the mortgage debts of 7000*l.* and 3000*l.* and interest were assigned to Goodwin, Partridge, and Durrant, and the mortgaged property was conveyed to them subject to a new proviso of redemption on
* 587 payment of 10,000*l.*, * and this deed contained covenants by the plaintiff for payment of the 10,000*l.* and for title.

It did not clearly appear what interest Ernest had in the estate, but such interest, if any, as he had ultimately became vested in J. C. Williams.

The mortgage against which relief was sought by the bill was dated the 1st of December, 1856, and was made between the plaintiff of the one part, and the defendant Frederick Edwards of the other part, and thereby, after reciting the indentures of the 21st of August, 1855, and the 23d of August, 1856, and that the plaintiff, having occasion for the sum of 3400*l.*, had applied to and requested the defendant Edwards to advance and lend him the same, which Edwards had agreed to do upon having the repayment of the said sum of 3400*l.* with interest for the same in the mean time secured to him in manner thereinafter mentioned, it was witnessed, that in consideration of 3400*l.* to or on the account of the plaintiff well

and truly paid by Edwards at or before the execution of the deed, the receipt of which the plaintiff acknowledged in the usual form, the plaintiff granted and confirmed to Edwards, his heirs and assigns, the Glyn Abbey estate by the description therein contained, to hold the same unto and to the use of Edwards, his heirs and assigns, subject to any agreements for leases and subject to the indenture of the 23d of August, 1856, and subject to a proviso for redemption on payment by the plaintiff, his heirs, executors, administrators, or assigns of the sum of 3400*l.* with interest at 6*l.* per cent on the 1st of June then next. The deed contained a covenant by the plaintiff for himself, his heirs, executors, and administrators to pay the aforesaid sum of 3400*l.* and the interest thereof on the day named in the proviso for redemption, and the usual covenant for payment of * interest in case the princi- * 588 pal money or any part of it remained unpaid after that day, and the usual absolute covenants for title by the plaintiff, the deed being framed on the footing that the plaintiff was the owner, and no trace of the interest of John Charles Williams appearing either on this deed or in the abstract of title. The usual receipt for the 3400*l.* was indorsed and signed by the plaintiff.

Messrs. F. L. Edwards and A. C. Edwards acted as solicitors for the defendant Edwards in this transaction, but the deed was in fact prepared by John Charles Williams, and only approved by them on behalf of the mortgagee. No other solicitor was employed in the matter.

That this mortgage-deed did not represent the real nature of the transaction was not in dispute. The facts were, that in 1854 the defendant Edwards had lent to a Mr. Loder, who was a client of Goodwin & Co., the sum of 3500*l.*, on the security of some Westminster Improvement Bonds and the personal security of Loder and a letter of guarantee given by the firm. In October, 1856, the bonds having become almost worthless, the defendant Edwards applied to Goodwin & Co. for payment or further security. John Charles Williams thereupon offered to give a second mortgage upon the Glyn Abbey estate for 3500*l.*, and the above-mentioned mortgage of the 1st of December, 1856, was accordingly given, it being ultimately arranged that 100*l.* should be paid off, and the mortgage taken for 3400*l.* instead of 3500*l.* No communication took place between the defendant Edwards and the plaintiff, the only com-

munications being between John Charles Williams and the solicitors of the defendant Edwards.

*589 *By an indenture of the 1st of October, 1859, made between the plaintiff of the one part and John Charles Williams of the other part, reciting the indentures of the 21st of August, 1855, and the 23d of August, 1856, and the mortgage of the 1st of December, 1856; and that the consideration money for the purchase of the hereditaments comprised in the indenture of the 21st of August, 1855, was the money of John Charles Williams; and that the 3400*l.* in the indenture of the 1st of December, 1856, expressed to have been paid to or on account of the plaintiff, was in fact paid to or on the account of John Charles Williams; and that the name of the plaintiff was made use of in all the thereinbefore recited indentures as a trustee only for John Charles Williams; and that the plaintiff had agreed to enter into the declaration and covenant thereinafter contained on being indemnified in manner thereinafter mentioned, the plaintiff declared himself to be a trustee of the property for Williams, and covenanted to convey it as Williams should direct. By the same indenture Williams covenanted to save harmless and indemnify the plaintiff, his heirs, &c., from and against the sums of 7000*l.* and 3000*l.* secured by the deeds of 11th and 12th July, 1853, and the 10,000*l.* secured by the indenture of 23d August, 1856, and the 3400*l.* secured by the indenture of the 1st of December, 1856, and the interest for the same respectively, and from and against all costs, charges, damages, and expenses which he or they might incur on account of the mortgage securities, or the covenants on the part of the plaintiff contained in any of the thereinbefore recited indentures, and from and against all loss and liabilities whatsoever by reason of the insertion of the name of the plaintiff as trustee in the said several indentures. This deed was executed by the plaintiff, but he alleged that he did so in ignorance

*590 *of its nature, except that he knew that he thereby declared himself to be a trustee of the property for Williams.

In September, 1861, Williams, being in difficulties, left the country; and sometime afterwards, the security on the Glyn Abbey estate being ascertained to be very insufficient, the defendant Edwards commenced an action upon the covenant for payment contained in the mortgage-deed. The plaintiff thereupon filed his bill against Edwards, John Charles Williams, and a trustee to

whom Williams had made an assignment for the benefit of his creditors, alleging that when the plaintiff executed the mortgage of the 1st of December, 1856, it was well known to the defendant Edwards, or his solicitors, that the plaintiff had no interest in the property and was only a trustee, and did not intend and was not intended to become personally liable to pay the mortgage debt, and that the mortgage was executed on an understanding and agreement to that effect; that the covenants were obtained from the plaintiff without any consideration, as the defendant Edwards knew or through his solicitors had notice; and praying that it might be declared that the plaintiff was not liable under the covenants for payment contained in the mortgage-deed, but that such covenants were void as against the plaintiff, and for an injunction. The Vice-Chancellor STUART made an order for a perpetual injunction, and the defendant Edwards appealed.

Mr. Bacon and *Mr. Cracknall*, for the plaintiff, in support of the decree.—There never was any contract whatever between Greenfield and Edwards. The deed represents a transaction totally different from any that really took place, and Edwards knew this. If the transaction is taken to be truly represented by the deed, Greenfield is not liable, * for he proves * 591 that no money was ever advanced to him. *Wall* v. *Cockerell.* (*a*) The dealings by Edwards were with Williams only; Edwards, having a bad security for what Williams owed him, applied to Williams for a better; Williams offered him a security on his Glyn Abbey estate, an estate known by Edwards to belong to him, the title is perused, and then a deed is drawn making Greenfield mortgagor and personally liable for the debt. This is inequitable, the relation of debtor and creditor never having existed between them. If Greenfield is liable at all, it can be only as surety, the debt not having been his. But he cannot be liable as surety, for he never contracted to be one, and, moreover, the dealings between Edwards and Williams were not fairly disclosed to him. *Railton* v. *Matthews*, (*b*) *Owen* v. *Homan*, (*c*) *Lee* v. *Jones.* (*d*) The case is within *Reynell* v. *Sprye.* (*e*) It was incumbent on Edwards to communicate with Greenfield. If,

(*a*) 10 H. L. Cas. 229.
(*b*) 10 Cl. & Fin. 934.
(*c*) 4 H. L. Cas. 997.
(*d*) 14 C. B. (N. S.) 386.
(*e*) 1 De G., M. & G. 660, 685, 691.

when a man lends money to a solicitor, the solicitor, instead of offering a security from himself, offers a security from a client, it surely is the duty of the lender to ascertain that the client knows what he is about: *Owen* v. *Homan*; (*a*) the circumstances raising the suspicion of fraud, so as to give notice to the mortgagee. *Kennedy* v. *Green*. (*b*)

Mr. Malins and *Mr. G. O. Edwards*, for the defendant. — The deed now impeached was deliberately executed by the plaintiff with professional advice, for he admits by his bill that Williams was his solicitor. He had, therefore, a solicitor chosen by
* 592 himself, and the * defendant was not bound to look further; indeed, he had no right to interfere between the solicitor and client. Edwards may have been, and in fact has been, induced to give up the security of Goodwin & Co. on the faith of this mortgage. It is urged against us that the deed does not truly state the nature of the transaction, but there is no rule that a deed must be set aside because it does not state the nature of the transaction with perfect accuracy. Then, as to the objection that the plaintiff did not understand the nature of the deed, we say, first, that no man who is represented by a solicitor can be heard to allege that he does not understand the deeds he executes. Few people, in fact, do personally understand them; but if they execute them under proper professional advice, they are bound, otherwise the affairs of mankind could not go on. Secondly, we say that the plaintiff must have understood the nature of the transaction; he is an experienced man of business, and the fact of his signing the receipt on the deed would show him the nature of what he was doing. *Railton* v. *Matthews* (*c*) and *Lee* v. *Jones* (*d*) have no application. In those cases the creditor was guilty of improper concealment; in the present case we had nothing to tell which it was our duty to divulge. *Hamilton* v. *Watson*, (*e*) *Wythes* v. *Labouchere*, (*g*) *Matthews* v. *Bloxsome*. (*h*) In *Wall* v. *Cockerell* (*i*) and *Kennedy* v. *Green*, (*b*) both parties were represented by the same solicitor, and those cases were decided on that ground. The plaintiff took an indemnity for Williams against the

(*a*) 4 H. L. Cas. 997.
(*b*) 3 M. & K. 699.
(*c*) 10 Cl. & Fin. 934.
(*d*) 14 C. B. (N. S.) 386.
(*e*) 12 Cl. & Fin. 109.
(*g*) 3 De G. & J. 593.
(*h*) 12 W. R. 795, Q. B.
(*i*) 10 H. L. Cas. 229.

consequences of the deed he was executing, and he ought to proceed on it, instead of attempting to set aside the deed. How can he be heard to say that he was deceived into executing.
* it, when he at the same time took an indemnity against * 593
the liability which he incurred by executing it?

Mr. Cracknall, in reply. — There are only two matters of fact in dispute, whether the plaintiff intended to undertake this liability, and whether the defendant contemplated his undertaking it. Both questions must be answered in the negative. The defendant rests on this, that Williams was the plaintiff's solicitor, and that the defendant had a right to assume that he would do his duty, but where a deed is executed which is manifestly to the prejudice of the client and to the personal benefit of the solicitor, it is not to be assumed that the solicitor is doing his duty. The principle of *Kennedy* v. *Green* governs the case. The defendant says that the plaintiff and defendant were at arms' length, but there never was any dealing between them. It was necessary that the plaintiff, being a trustee, should execute the mortgage for the purpose of passing the legal estate, but that a dry trustee should covenant for payment of the mortgage money is quite out of the ordinary course of practice, and was notice of fraud to the defendant, who knew that he had never bargained for the personal liability of anybody but Williams.

The Lord Justice Knight Bruce. — The mortgage to the defendant Mr. Edwards, dated the 1st of December, 1856, the covenant for payment contained in which is impeached by the bill in this cause, an impeachment to which the decree before us accedes, was a mortgage to that defendant founded on valuable consideration paid by him, and was legally executed by the plaintiff, who was a necessary or proper party to the mortgage as a conveyance. In the transaction of the mortgage Mr. John Charles Williams, * mentioned in the bill, must on the evidence in the * 594
cause be considered to have been the plaintiff's solicitor, to have been so appointed by him, to have so acted, and to have approved in that character the mortgage on the plaintiff's behalf before the plaintiff executed the instrument. I apprehend that in and throughout the business the defendant Mr. Edwards (the mortgagee) and his solicitors did and were entitled to treat Mr. Wil-

liams and deal with him as the plaintiff's solicitor, having the plaintiff's authority for what Mr. Williams as the plaintiff's solicitor agreed to and did on the plaintiff's behalf, nor was there, I think, any legal or equitable obligation upon the defendant Mr. Edwards, or either of his solicitors, to ascertain or inquire whether before or in the course of the business the plaintiff had personally full or accurate information. The amended bill in its first six paragraphs states thus: [His Lordship here read those paragraphs, and then the 37th paragraph of the bill.] The deed in question must for every purpose of this suit, I conceive, be taken as being the plaintiff's deed; that is to say, an instrument legally well signed, sealed, and delivered by him as his act and deed. There are not, I think, materials before the Court showing or leading to the inference that, in consenting to execute or in executing it, the plaintiff was deceived or misled by Mr. Williams; and it cannot, I conceive, on these materials be, at least as between the plaintiff and the defendant Mr. Edwards, deemed that the plaintiff when he executed the deed was not aware of the true state of the facts relating to the 3400*l.* mentioned in the deed, so far as it was of importance to him to know them. I consider, therefore, that the plaintiff has, as between him and the defendant Mr. Edwards, not shown any title to be relieved against the covenant, for the charge in the amended bill of time having been given by Mr. Ed-
* 595 wards to Mr. Williams, so as, between the plaintiff * and Mr. Edwards, to discharge the plaintiff considered as a surety, is, I conceive, not sustained by the evidence. There was, I think, upon the evidence no specific or fixed time promised to be given. I am not sure whether the plaintiff wishes to obtain any decree against Mr. Williams, who appears to be out of the jurisdiction, and Mr. Turquand, as a trustee for Mr. Williams's creditors, or against either of them.

THE LORD JUSTICE TURNER. — I should have desired to reserve my judgment in this case if I had not had an opportunity of considering it out of Court. Whether the appeal is well founded or not, it cannot be denied that the decision of the Vice-Chancellor involves a point of great importance. The plaintiff has executed a mortgage-deed by which he covenanted for the payment of 3400*l.* and interest to the defendant Edwards, and by the decree of the Vice-Chancellor it is held that the plaintiff is not liable upon that

covenant. Now of course it cannot be disputed that if a fraud was practised upon the plaintiff in procuring him to enter into that covenant, and if the defendant, to whom that covenant was made a security, had notice of that fraud, the case would be perfectly clear and free from all difficulty. But it is obviously very dangerous to extend the doctrine of this Court, applicable to cases of fraud, to cases where there is absence of fraud or absence of notice of the fraud. The real questions in this case are, whether there was a fraud practised by Williams upon the plaintiff, and, if so, whether the defendant had notice of that fraud.

Now, first, as to the fraud alleged to have been practised by Williams upon the plaintiff. Much has been said in the course of the argument upon the subject * of Williams having been the solicitor of the plaintiff. Whether rightly or wrongly, I do not attach so much importance to that consideration as has been attached to it in the argument, for undoubtedly the plaintiff executed this deed and left this deed, which he had executed, in the hands of Williams, and Williams, being empowered by the plaintiff's leaving the deed in his hands to deal with it, has dealt with it and deposited and made it a security to the defendant, and I certainly am not at all satisfied that under those circumstances, whether Williams was the plaintiff's solicitor or not, it would be competent to the plaintiff to set up against the defendant any fraud practised upon him, the plaintiff, by Williams. If a party will leave a deed executed by him in the hands of another person, and that deed so left in his hands is made by him a security to a third person who acts honestly and fairly in the transaction, I am by no means satisfied that it is competent for the person who has left the deed in his hands to set up against the third party, who has honestly taken it as security, the fact, if fact it be, of fraud having been committed upon the person leaving it.[1] The case, therefore, in my view of it, depends upon the question whether there was notice of the alleged fraud, rather than upon the question whether there was fraud or not. * 596

Now what are the elements of this case as regards notice of the fraud? First, it is said that the recitals contained in this deed were altogether false, that there was no such loan of 3400*l.* as appears upon the face of the deed to have been made, and more-

[1] See Roberts *v.* Croft, 2 De G. & J. 1, and cases in note (1); Perry Herrick *v.* Attwood, 2 De G. & J. 21, and note (1).

over that the 3400*l.* never was in fact due upon the security of the estates. But if we are to set aside mortgage-deeds upon the ground that the facts of the case are not truly recited in them, because they recite a present loan, when in truth the loan had been * 597 previously made or the security was * in respect of an antecedent debt, a very large proportion of mortgages will be wholly invalid, since nothing is more common than for a mortgage-deed executed as a security for an antecedent debt to be made in the form of a security for money advanced at the time. I cannot, therefore, go the length of holding that the recital contained in this deed that the money was then advanced, when in truth the security was for an antecedent debt, can be construed as importing notice that there had been any fraud in the transaction. Then it was further urged, that the plaintiff stood in the position of being a bare trustee of the estate for Williams, that the debt was due from Williams to Edwards, and that there was no contract between the plaintiff and Edwards to render the plaintiff liable for the debt. But I do not think that the fact of its being known to Edwards that Williams was the owner of the estate, and that Williams was the debtor to him, imports any notice to Edwards that the plaintiff was not willing to become liable for the payment of the debt. Are we to hold that it was the duty of Edwards to have gone to the plaintiff and asked him whether he was aware that he, being only a trustee for Williams, was not liable to enter into a covenant for the payment of the debt, and whether Williams had his authority to insert that covenant in the deed? I do not think that anybody ever heard of any such rule as that the party who takes the security is bound to interfere between the party who gives the security and the solicitor of that party.

But if there were any doubt upon this question, how do the facts of this case stand? It is clear on the evidence that the plaintiff had been made throughout the tool of Williams. Williams, or Williams and Ernest, originally purchased this estate. The conveyance was taken in the name of Greenfield, the plaintiff. * 598 The * estate was purchased for 10,300*l.*, and was subject to mortgages for sums amounting to 10,000*l.*, which were not paid off, and by the deed of conveyance Greenfield, the plaintiff, covenants for the payment of that sum of 10,000*l.* Those mortgages were transferred, and upon the transfer the plaintiff again covenanted for the payment of the 10,000*l.* Then there came the

mortgage to the defendant Edwards, and again Greenfield, the plaintiff, covenanted for the payment of the mortgage-debt. After all this a deed of the 1st of October, 1859, was executed, in which all these mortgages are recited, and a covenant is entered into by Williams with Greenfield, the plaintiff, to indemnify Greenfield against payment of them. It is impossible, I think, to look at this case without seeing that the plaintiff has, in truth, allowed himself to be made the tool of Williams for the purpose of all these transactions, and I cannot come to any such conclusion as that after having so acted he can be allowed to set up the case that he was deceived by Williams, and that he executed this deed without any notice of there being any covenant contained in it.

The plaintiff further rests his case on the ground of suretyship, and contends that there was a concealment of the real state of the transactions between Williams and Edwards, and that this concealment ought to be held to invalidate the covenant contained in the mortgage. Now, no doubt, where a person is induced to enter into a suretyship on a false representation of the state of circumstances, or where there are circumstances connected with the transaction which are purposely concealed by the creditor, the surety cannot be held liable.[1] But the concealment, as I apprehend, must be a concealment of facts which it was the duty of the person to whom the mortgage was made, or with whom the suretyship was contracted, to reveal.[2] If there was no duty * incumbent upon * 599
the person by whom the concealment is alleged to have been made to reveal the circumstances which had occurred between him and the principal debtor, I certainly am not prepared to go the length of saying that the surety can be relieved, and I think that the authorities referred to by *Mr. Malins* in the course of the argument fully bear out that view of the case. I think, therefore, that, looking at the present as a case of suretyship, the plaintiff's case wholly fails; and I think also, for the reasons which my learned brother has given, that the case of time given, which is alleged by this bill, also fails. The case of *Kennedy* v. *Green* (*a*) was very much relied on by *Mr. Cracknall* in support of his very able argu-

(*a*) 3 M. & K. 699.

[1] See Owen *v.* Homan, 3 Mac. & G. 378, note (2), and cases cited; Franklin Bank *v.* Cooper, 36 Maine, 179; Kerr F. & M. (1st Am. ed.) 122, 123.

[2] See Kerr F. & M. (1st Am. ed.) 95, 122; Evans *v.* Carrington, 2 De G., F. & J. 481 and note (1); M'Lure *v.* Ripley, 2 Mac. & G. 274.

ment, both in opening the case and in reply; but in *Kennedy* v. *Green* there were no such circumstances as have occurred in the present case. There was no leaving the deed after its execution in the hands of the solicitor to be dealt with by him, and no such subsequent dealings with it as we have here.

On the whole, therefore, my opinion does not agree with that of the Vice-Chancellor in this case, and I think that the bill must be dismissed as against the defendant Edwards.

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*600 *GOOLD *v.* The GREAT WESTERN DEEP COAL COMPANY.

The GREAT WESTERN DEEP COAL COMPANY *v.* GOOLD.

1865. June 8, 9, 11, 24, 26. July 11. Before the Lord Chancellor Lord WESTBURY.

The upper veins of coal of a tract in the Forest of Dean were "galed" by the Crown under the Forest of Dean Mining Act (1 & 2 Vict. c. 43) to the plaintiffs, with a reservation that the underlying veins might be galed to other parties, "but to be worked so as not to impede or injure the working of tracts already allotted." The veins underlying the plaintiffs' colliery were afterwards galed to the defendants, who sunk a shaft through the plaintiffs' works: *Held*, that the restriction applied only to the working of the lower seams when reached, and did not abridge the right of the defendants to sink a shaft through the upper veins.

Whether the commissioners had power under the 1 & 2 Vict. c. 43, to impose on existing galees any rules and conditions which would diminish the rights which they enjoyed before the Act, *quære*.

THIS was an appeal from a decree made by Vice-Chancellor WOOD.

The facts of the case were shortly as follows: Previously to the year 1838, the Forest of Dean, in the county of Gloucester, which is the property of the Crown, had from time immemorial been subject to prescriptive rights of mining enjoyed by the free miners of the district. In that year an Act of Parliament (1 & 2 Vict. c. 43) was passed for the purpose of defining and regulating the rights of the free miners in working existing mines or "gales," and for granting new allotments; and commissioners were appointed who

were to make awards in pursuance of the Act, and to publish rules and regulations for the future management of the district.

In 1861 a further Act (24 & 25 Vict. c. 40) was passed, which amended the previous Act in various particulars. On the 8th March, 1841, the commissioners made an award under the first Act, by which they confirmed the right of Edward Prothero, under whom Messrs. Goold, the plaintiffs in the original suit, claimed to work gales in the Bilson colliery in the upper series of coal down to * and including the "Churchway High Delf Vein," *601 but subject to certain rules and regulations imposed by the commissioners. The second of these regulations provided, that no person should be entitled to any other vein of coal than those awarded or galed by the commissioners, and that any underlying or other vein not so awarded or galed might be galed to other parties, "but to be so worked as not to impede or injure the workings of the tracts already allotted or thereafter to be allotted or galed."

In 1863 the Great Western Deep Coal Company, the defendants in the original suit, purchased gales which had been allotted in 1843 and 1852 for working the "Coleford High Delf," a deep vein of coal which lay 160 yards below that part of the Churchway High Delf which had been allotted to Messrs. Goold, within certain boundaries marked on the surface by the deputy-gaveller, who was the officer of the commissioners appointed for that purpose.

The company commenced sinking a shaft through the Churchway High Delf, in order to reach their own vein, but Messrs. Goold immediately filed their bill to restrain them, and moved for an interlocutory injunction. The Vice-Chancellor granted the injunction only so far as to restrain the defendants from working so as to injure the plaintiffs' mines.

The plaintiffs then drove a level from one of their old workings in such a manner as to obstruct the company's pit. The company then filed a cross-bill against the plaintiffs in the first suit, to restrain them from obstructing their works, and claiming compensation for the damage done. Both suits were brought on at the same * time on motion for decree. It appeared from *602 the evidence that the veins of coal and other strata lay in a series of concentric basins, which cropped up to the surface at the edges of the district, and that underneath the Churchway High

Delf vein, which was the lowest of the upper series of strata, and between it and the Coleford High Delf vein there lay certain veins of stone and coal, and below them a tract of stone called the Coleford High Delf stone, which was just above the Coleford High Delf vein of coal, and which was impervious to water; and Messrs. Goold contended, that if this tract of stone was pierced through by the company a large quantity of water would find its way from the higher levels into the Bilson colliery, and flood their works. The company, however, produced evidence to prove that the water was not likely to rise to any dangerous extent, and that it could be kept in check by pumping at a reasonable expense.

The Vice-Chancellor dismissed the original suit without costs, being of opinion that the company were entitled to sink their shaft through the Bilson colliery, but that the damage anticipated from the water gave the plaintiffs reasonable ground for coming to the Court: and in the cross-suit he restrained Messrs. Goold from interfering with the works of the company, and directed an inquiry as to the injury already done by the levels which had been driven into their pit.

Messrs. Goold appealed from this decision.

Mr. Rolt, *Mr. Manisty*, and *Mr. Winterbotham*, for the appellants. — The appellants had by ancient custom an exclusive right to work their mine without interference from any galees of
* 603 the lower strata. There was nothing in the * Act to take away this right; the Act only ascertained and confirmed it. The commissioners had no power to make any rules or conditions which would derogate from the appellants' rights.

Secondly, we contend that upon the true construction of the Act there was no reservation on the part of the Crown, as owner of the soil, of any power to permit any subsequent galees to work through or otherwise interfere with appellants' colliery. The rights of the company were expressly made subordinate to the rights of the appellants. If the construction contended for the company be correct, the commissioners might grant any number of licenses to break through the appellants' mine, which would make it practically valueless. If it had been intended that any such injury should be done, the Act would have contained a clause giving compensation to the galees of the upper strata. This is not like the case of a way of necessity, for there are other

modes of getting at the lower seams beside breaking through the appellants' colliery. *Pinnington* v. *Galland*, (*a*) *Proctor* v. *Hodgson*, (*b*) *Dutton* v. *Tayler*, (*c*) *Suffield* v. *Brown*, (*d*) *Lyddal* v. *Weston*, (*e*) *Seaman* v. *Vawdrey*, (*g*) *Bourne* v. *Taylor*. (*h*)

Thirdly, the company will cause by their pit irreparable damage to the appellants' works, by letting the water in. They are therefore entitled to an injunction. *North Eastern Railway Company* v. *Elliott*, (*i*) *Crowder* v. *Tinkler*, (*k*) *Hepburn* v. *Lordan*, (*l*) *Powell* v. *Aiken*. (*m*)

* *Sir H. Cairns*, *Mr. Giffard*, and *Mr. B. B. Rogers*, for * 604 the Great Western Deep Coal Company. — The Act of 1838 makes a complete *tabula rasa* of all rights in the Forest of Dean acquired previously to the passing of the Act. *Attorney-General* v. *Mathias*. (*n*) But in this case the appellants in their bill do not rest their title on prescription, but on the Act and the award made under it, and treat the regulations of the commissioners as binding their interest.

The reservation of the lower seams of coal implied a right of way of necessity, and it is sufficient if the company show that the most convenient way of reaching the lower seams is through the appellants' colliery. *Newby* v. *Harrison*, (*o*) *Dand* v. *Kingscote*, (*p*) *Earl of Cardigan* v. *Armitage*. (*q*) The restriction in the regulation, as to working the lower seams without impeding the workings of the seams previously allotted, applies to the working of the coal when reached, and does not restrict the liberty of sinking shafts. The danger anticipated from the water in consequence of the working of the company's mine is merely visionary. The evidence proves that there will be no injury unless the mine is improperly worked. Until it is shown that the company are working or are intending to work their mine improperly, the Court will grant no injunction. *Haines* v. *Taylor*. (*r*)

(*a*) 9 Exch. 1.
(*b*) 10 Exch. 824.
(*c*) 2 Lutw. 1487.
(*d*) 12 W. R. 356.
(*e*) 2 Atk. 19.
(*g*) 16 Ves. 390.
(*h*) 10 East, 189.
(*i*) 2 De G., F. & J. 423; S. C., 10 H. L. Cas. 333.
(*k*) 19 Ves. 617.
(*l*) 13 W. R. 1004.
(*m*) 4 Kay & Jo. 343.
(*n*) 4 Kay & Jo. 579.
(*o*) 1 Jo. & H. 393.
(*p*) 6 M. & W. 174.
(*q*) 2 B. & Cr. 197.
(*r*) 2 Phil. 209.

The Attorney-General, *Mr. W. M. James*, and *Mr. Hanson* appeared for the Crown.

Mr. Rolt replied.

Judgment reserved.

* 605 * The Lord Chancellor, after the conclusion of the arguments, said that he wished before delivering judgment to be furnished with some further evidence as to the actual state of the workings in the respective mines at the present time, the number of men employed and the quantity of coal raised in the appellants' colliery, and also the quantity of water met with by the company in their works, and the power of their steam-engine.

Affidavits on these points were accordingly filed.

July 11.

The Lord Chancellor having resigned the Great Seal before delivering judgment, the following written judgment, of this date, was afterwards given by his Lordship to the parties: —

The first ground that was taken by the plaintiffs' counsel in their elaborate and able argument was, that the commissioners under the Forest of Dean Mining Act had no statutory authority to impose on existing galees any rules or conditions that would derogate from the interest or diminish the right of enjoyment held and possessed under those galees, which were in force and operation at the time of the passing of the Act.

I should have felt much difficulty in deciding that question, but I am relieved from considering it by the form of the plaintiffs' bill, which distinctly pleads and treats the award made under the Act as forming the title of the plaintiffs, and the rules made by the commissioners as regulations which bind the plaintiffs and their interest.

I must, therefore, consider the award, so far as it relates to the plaintiffs' collieries, as if it had been the original grant by
* 606 the Crown of the tracts or seams of * coal described in it to Edward Prothero, under whom the plaintiffs derive their title, and I must consider and treat the second rule of the commissioners as if it were a provision or reservation contained in such original grant.

The question which then arises is, Does this reservation, taken in conjunction with the Act, warrant the subsequent gale made to the defendants and the license granted to them of sinking a pit that should pass through part of the seams galed to the plaintiffs, and still remaining ungotten ?

If the second rule be treated as a reservation in the gale to the plaintiffs, such reservation will be found to be divisible into two parts ; first, the reservation of a power or right to gale the underlying seams of coal ; secondly, a restrictive provision that the underlying seams, when galed under such power, shall not be so worked as to impede or injure the working of the upper seams.

It is contended by the defendants that the reservation, taken without the restriction, gives power to gale the under seams, with liberty to sink through the upper seams, in order to win the lower, — such mode of proceeding being of necessity ; and the defendants insist that this right is not qualified by the restriction, which, they contend, applies only to the working of the lower seams, and not to the process of winning or getting them.

A reservation of this kind is to be considered as if it were a counter grant by the grantee to the grantor.[1] To determine its effect, it must be recollected, that the galee, who is the grantor in the reservation, has no other estate or interest under his gale than the right of getting the * seams of coal which are * 607 granted to him ; and that after he has gotten the coal his interest ceases, and the space occupied by the coal that has been won is vested in the Crown, who remains owner of all that is not granted.

It would be idle, therefore, to treat the reservation as a re-grant by the galee to the Crown of a right to license the sinking of a pit through the empty space, for that the Crown has at once, without the necessity of any reservation.

I must regard the first part of the reservation, therefore, as giving the Crown the power of granting the right to the subsequent

[1] "A reservation is something newly created out of the granted premises, by force and effect of the reservation itself, as an easement out of land granted, or rent out of land demised." SHAW C. J., in Hurd *v.* Curtis, 7 Met. 110; Garland *v.* Hodsdon, 46 Maine, 515, 516; Winthrop *v.* Fairbanks, 41 Maine, 307. An exception is always a part of the thing granted, but a reservation is of a thing not *in esse*, but newly created or reserved. PARKER C. J., in Cocheco Manuf. Co. *v.* Whittier, 10 N. H. 305; see Cutler *v.* Tufts, 3 Pick. 272; Angell Watercourses (6th ed.), § 174 *et seq.*

galee of the lower seams of sinking a pit through the upper seams, and the added proviso must be so construed as not to render this reservation nugatory. Now, to sink a pit through a vein of coal that is capable of being worked and gotten must of course occasion some detriment to the galee thereof, and the pit must, to a certain extent, impede the future workings of that galee; and if the fact of this injury and impediment were sufficient to prevent the exercise of the right reserved, the reservation would be worthless, for such detriment must of necessity accompany any exercise of the right. I am of opinion, therefore, that the words "but to be so worked as not to impede or injure the workings of the tracts already allotted" are only a restriction upon the mode of working the lower seams when they are reached by the galee thereof, and do not impose any fetters or limitation on the right of granting liberty to sink through the upper veins.

The Act of course assumes, that the powers conferred on the deputy gavellers by sections 56, 60, and 62, will be exercised with discretion and care, and that liberty to sink pits will not be
* 608 given to the galees of the under * seams when the exercise of such right would be attended with any serious loss to the upper galee.

It is true, that the Act has not provided for compensation to the upper galee for the coal that will necessarily be lost to him by the sinking through his vein; and it is possible that the legislature considered that the gaveller, whenever he gave a license to win the under seams by working the upper, would impose as a condition on the galee of the under seams the obligation of making full compensation to the galee of the upper. Otherwise there seems a defect in the Act in this particular, for although a Court of Equity would give the upper galee an account of the coal gotten by the under galee in the process of sinking, yet this would not be the full measure of the compensation that ought to be made, for, in addition to the coal actually severed in the process of sinking, a considerable extent of a vein of coal might become unprofitable, by reason of a pit having been sunk through it. But, for the reasons already given, I cannot allow this want of an effectual remedy for his loss by the upper galee to be a ground for depriving the Crown of the right to gale the under seams, with liberty to sink through the upper, or for depriving the under galee of his right to the benefit of the grant so made to him.

In my observations on this part of the case I am conceding to the plaintiffs (for the purpose of the argument, but without at all intending so to decide), that the upper galee has no effectual remedy for all the damage sustained by him in consequence of a shaft being driven through his veins of coal.

His Honor the Vice-Chancellor appears to have treated this part of the case as concluded by the authority * of the * 609 *Earl of Cardigan* v. *Armitage*, decided by the Court of King's Bench in 1823. (*a*)

That case was decided on the principle that, where there is a general reservation or exception, the rights or powers implied in such reservation or exception shall not be restrained or abridged by affirmative words expressive of part of that which is implied, because a general power which is incident or implied shall not be restrained by a particular power given by the grantor in the affirmative which the grantor had before. In such a case the maxim "expressum facit cessare tacitum" does not apply, and the words giving the special power shall not restrain the general power because they are in the affirmative only.

But I cannot perceive what application this decision has to the present case; for here, taking the following words in the second rule, namely, "and any underlying or other veins not so awarded or galed may be galed to other parties," as amounting to a general reservation, the words that follow, namely, "but to be so worked as not to impede or injure the workings of the tracts already allotted," are negative and not affirmative, and operate as words restrictive of the power implied or rather of the grants to be made under such power.

But though I do not recognize the applicability of the case cited, yet I am of opinion, for the reasons given, that the words last quoted, although they are restricted, cannot be founded on for granting any injunction to restrain the sinking of the defendants' pit through the seams of the plaintiffs.

* My decision renders it unnecessary to consider the other * 610 ground insisted on by the defendants, and which appears to me to be proved by the evidence; namely, that at the time when the deputy gaveller fixed the situation of the new pits of the defendants, there was no reason to believe that the sinking of such new pits would interfere with any actual workings of the plaintiffs; and

(*a*) 2 B. & C. 197.

further, that the only workings of the plaintiffs with which the new pit of the defendants interferes are such as have been made by the plaintiffs designedly for the express purpose of coming into collision with the defendants, and laying a foundation for this suit. This last fact must not be forgotten in considering the residue of the case of the plaintiffs; namely, the alleged imminent danger of their works being irreparably ruined by the operations of the defendants.

On this point of the case, which appears to have given his Honor the Vice-Chancellor some anxiety, I had the advantage of receiving additional and very satisfactory evidence, for inasmuch as many days had elapsed after the Vice-Chancellor's judgment before I read and considered the affidavits at the end of the argument, I deemed it right not to decide upon the conjectural statements contained in the affidavits which were before his Honor, but to ascertain by further inquiry the actual results of the workings of the defendants since the decree. This further inquiry has left no doubt upon my mind.

The case presented to me on the part of the plaintiffs was, that between the Churchway High Delf vein, which is the lowest of the upper strata, and the Coleford High Delf vein a great body of water would be found, and that this intermediate space was occupied by a vein of porous stone called the Brasilly stone, beneath
* 611 which was a * seam of coal called the Brasilly vein, beneath which again was another seam of stone also called Brasilly stone, and below this a tract of stone called the Colefield High Delf stone; and the statement on the part of the plaintiffs, which I extract from their numerous affidavits, was, that if the stone above the Colefield High Delf vein should be once struck by the pits of the defendants, it would be impossible to keep the water down, except at a ruinous expense. Since the decision of the Vice-Chancellor the defendants have disproved this statement on the part of the plaintiffs by actual experience, for it is clearly proved by the affidavits subsequently filed, and which bring the account of the defendants' working down to the third day of the present month, that the plaintiffs have actually carried their pits through the upper vein of the Brasilly stone and the vein of Brasilly coal, and have penetrated to a considerable depth into the lower vein of the Brasilly stone, without finding any thing beyond a very inconsiderable quantity of water.

It appears that the water that flows into the deep pit of the defendants is not more than from fifteen to twenty gallons per hour, and that the water which runs into the other pit is not more than from forty to fifty gallons per hour. On the other hand it appears that the engine of the defendants already at work at the pits is capable of winding 5400 gallons of water per hour, and that a new engine which is in course of being erected by the defendants, and which may be completed in a fortnight, is capable of lifting 30,000 gallons of water per hour. These facts are not attempted to be contradicted on the part of the plaintiffs, but in their further affidavits they have departed from their original allegations, and now represent that a much larger quantity of water will be found by the defendants in the stone lying immediately above the Coleford High Delf vein, and called the Coleford * High * 612 Delf stone, than in all the strata taken together from the surface down to such stone.

The whole of the original case, therefore, attempted to be proved by the plaintiffs, that if the stone about Brasilly vein was once struck by the pits of the defendants, it would be impossible to keep the water down except at a ruinous expense, has been shown by experience to have been an erroneous conjecture.

I cannot, therefore, but conclude, in the language of the defendants' affidavits, that there is not, upon the facts as they now stand, any risk whatever of the plaintiffs' mines being damaged by any water that may arise from defendants' workings. I am also satisfied that the workings of the defendants are being conducted upon a skilful and improved method, and that the means which they have provided in their engines and apparatus are sufficient to remove all reasonable ground of apprehension of danger to the plaintiffs. In my judgment, therefore, the plaintiffs' case entirely fails, and I have reluctantly been forced to the conclusion that this suit has been instituted, not so much for the legitimate purposes of relief, as in the hope of its becoming an instrument to effect a different object. I must therefore decline to interfere with the decree of the Vice-Chancellor, and I am obliged to dismiss this appeal with costs.

* 613 * KIRKWOOD *v.* THOMPSON.

1865. July 15, 18, 20. Before the Lord Chancellor Lord CRANWORTH.

A second mortgagee may purchase from the first mortgagee, selling under his power of sale;[1] and with respect to the question of undervalue, he is in the same position as a stranger.[2]

The circumstance that the second mortgage is in the form of a trust for sale makes no difference.[3]

Nor is it material that the second mortgagee is in possession at the time of the sale.

THIS was an appeal from a decree of Vice-Chancellor WOOD. (*a*) The bill was filed by the heir-at-law and administratrix of Stephen Kirkwood, late of Kingston-upon-Hull, to redeem certain hereditaments which had been mortgaged and sold under the following circumstances: —

By an indenture dated the 17th January, 1846, certain hereditaments, the property of Stephen Kirkwood, were conveyed by him to William Cash and others in fee by way of mortgage for securing the sum of 5500*l.* and interest. The mortgage contained a power of sale in case of default in payment of principal or interest on six months' notice.

By another indenture dated the 16th June, 1846, other premises were mortgaged by Stephen Kirkwood in fee to George Davidson and others, as the trustees of the National Provident Institution, to secure 4000*l.* and interest.

By an indenture of even date the said sum of 4000*l.* was further secured by a second mortgage of the premises comprised in Cash's mortgage.

The two last-mentioned deeds contained power of sale, subject to the proviso that the power should not be exercised without six months' notice, or unless three months' interest was in
* 614 arrear; and they also contained a proviso * exempting the

(*a*) Reported 2 Hem. & Mill. 392.

[1] See Parkinson *v.* Hanbury, *ante*, 450, and citations in note (3); Shaw *v.* Bunny, *ante*, 468, note (1).

[2] See Ford *v.* Holden, L. R. 3 Eq. 461.

[3] See Parkinson *v.* Hanbury, *ante*, 450 and note (3).

purchaser from liability to see to the performance of this condition, and restricting his remedy to damages only.

Subsequently to these deeds Stephen Kirkwood, having borrowed 1000*l.* from the North of England Fire and Life Insurance Company, agreed to execute a good and effectual mortgage to the defendants Messrs. Thompson and Carr, as trustees for the insurance company, of the hereditaments comprised in the previous mortgages. This agreement was carried into effect by an indenture dated the 10th December, 1847, and made between Stephen Kirkwood of the one part and Messrs. Thompson and Carr of the other part, whereby Kirkwood conveyed to Messrs. Thompson and Carr in fee all the hereditaments comprised in the above-mentioned mortgage-deeds, but subject to the prior mortgages, upon trust that Messrs. Thompson and Carr should, in their discretion, at any time, without any further consent or concurrence of Stephen Kirkwood, his heirs, executors, administrators, or assigns, sell and absolutely dispose of the premises, and should out of the proceeds of such sale pay all costs and expenses, and the principal money and interest due to themselves, and all other incumbrances, and pay over the surplus to the mortgagor.

Kirkwood died in July, 1848, leaving a will, but the executor renounced probate, and administration was granted to Mary Todd, one of the plaintiffs, on the 10th February, 1859.

In 1849, in consequence of default having been made in payment of the interest due to them, the North of England Insurance Company entered into possession of the premises and received the rents, which were, however, as they stated in the answer, insufficient to pay * the interest on the company's mortgage, * 615 after paying the interest on the prior mortgages.

In 1850 the trustees of the National Provident Institution, with the consent of the persons interested in Cash's mortgage, put up to auction the whole of the hereditaments comprised in their mortgage. Previously to the sale the solicitors of the National Provident Institution communicated to the North of England Company their intention to sell, and gave them a formal notice to pay the prior mortgage, but no notice was given to any person on behalf of the mortgagor, there being at that time no representative of Kirkwood's estate.

Mr. Hall, one of the directors of the North of England Company, attended the sale, which took place on the 24th October,

1850, and became the purchaser of part of the property for 5590*l*. The North of England Company adopted this purchase and paid the purchase-money, and Hall executed a declaration of trust in their favour.

The North of England Company was subsequently dissolved, and their business was purchased by the Liverpool and London Fire and Life Assurance Company, and the premises were conveyed to their trustees in May, 1860.

The plaintiffs filed the present bill against Messrs. Thompson, Carr and Hall and the Liverpool and London Assurance Company, praying that the plaintiffs might be declared entitled to redeem the premises purchased by Hall, and that Hall and all persons claiming under him might be declared trustees for the plaintiffs, and that, if necessary, the conveyance to Hall and to the
* 616 Liverpool and London Assurance Company might be * cancelled, and that the premises might be conveyed to the plaintiffs on payment by the plaintiffs of what should be found due from them on taking the accounts, and that in taking the accounts the defendants might be charged with the full value of the mortgaged premises at the present time, or at such other time as the Court might think fit.

The Vice-Chancellor was of opinion that there was no reason either in law or under the special circumstances of the case for impeaching the sale, and dismissed the bill with costs. From this decision the plaintiffs appealed.

Mr. Willcock and *Mr. T. A. Roberts*, for the plaintiffs. — The sale to Hall was really one to the North of England Company, who were second mortgagees and also in possession. A second mortgagee cannot purchase for his own benefit from the first mortgagee. He is in the position of a trustee for the mortgagor; and here we have the additional circumstance that the purchasers were in possession, and had thereby an advantage in getting up the sale, and special means of knowledge. Moreover, they were not simple mortgagees, but trustees for sale, for their security was in that form, and they were, therefore, in a special position of trust. *Rakestraw* v. *Brewer*, (*a*) *Re Bloye*, (*b*) *Ex parte Rushforth*, (*c*) *Smith* v. *Chichester*, (*d*) *Ex parte James*, (*e*) *Downes* v.

(*a*) 2 P. Wms. 511.
(*b*) 1 Mac. & G. 488.
(*c*) 10 Ves. 409.
(*d*) 1 Con. & Law. 488.
(*e*) 8 Ves. 337.

Grazebrook, (*a*) *Ex parte Hughes*. (*b*) The case of *Shaw* v. *Bunny*, (*c*) in which the Lords Justices differed, is the only authority against us.

* With respect to the question of value: the sale must be * 617 treated not as a sale between strangers, but as strictly as any other transaction between persons in a fiduciary relation.

Mr. Giffard and *Mr. Kay*, for the defendants. — The sale was by auction, and perfectly fair and open. Strangers were present, and purchased several of the lots. The second mortgagees had nothing to do with getting up the sale, which was entirely managed by the first mortgagees.

The right of a second mortgagee to purchase from a first mortgagee is established by *Shaw* v. *Bunny*. (*d*) And there is no distinction between an ordinary mortgage and a security in the form of a trust for sale. In neither case does the mortgagee stand in a fiduciary relation to the mortgagor. *Parkinson* v. *Hanbury*, (*e*) *Dobson* v. *Land*, (*g*) *Knight* v. *Marjoribanks*. (*h*)

Mr. Willcock, in reply.

THE LORD CHANCELLOR (LORD CRANWORTH). — This case does not appear to me to present any real difficulty. In the first place, that a mortgagee can purchase from his mortgagor is a matter that is always considered as settled, though, I believe, in some early cases there has been allusion to a doubt on the subject; and Sir EDWARD SUGDEN said that the relation between trustee and *cestui que trust*, although in some sense existing between mortgagee and mortgagor, has never been so held to exist as that the mortgagee cannot * purchase from the mortgagor.[1] That is not * 618 disputed. Then if that is so, why should there be any difficulty on this subject? The real reason why a person standing in the relation of trustee cannot purchase from the *cestui que trust* is, that he cannot purchase that which he is to sell; he has a duty to

(*a*) 3 Mer. 200.
(*b*) 6 Ves. 617.
(*c*) 13 W. R. 374, [*ante*, 468.]
(*d*) 13 W. R. 374.
(*e*) 1 Dr. & Sm. 143; S. C. on appeal, 13 W. R. 331.
(*g*) 8 Hare, 216.
(*h*) 2 Mac. & G. 10.

[1] See 2 Sugden V. & P. (8th Am. ed.) 689 and note (*v*); Ford *v.* Holden, L. R. 3 Eq. 461.

perform and of course he cannot purchase, for that would be putting himself in a situation in which his interest would become an interest inconsistent with the duty which he has to perform.[1]

The next step is, can he purchase under a power of sale executed by a first mortgagee? It seems to me to follow as a necessary corollary, because the sale that is made under the power of sale by a first mortgagee is substantially a sale by the mortgagor, for it is a sale made under an authority given by the mortgagor paramount to the title of the second mortgagee. It seems to me, that on the principle of the case there is no difference whatever between a purchase from a first mortgagee under a power of sale and a purchase from the mortgagor himself. Even if that were doubtful upon principle, I consider it to have been settled by authority in the case of *Shaw* v. *Bunny*, because there is no way of getting out of the fact, that that case was so decided by the Master of the Rolls, was brought by way of appeal before this Court, and was so decided by the Lords Justices. It is very true that the learned Judge, Lord Justice TURNER, expressed some doubt about it, but that does not signify, it is just the same as if the case were brought before a Court where there are several Judges sitting, and the majority so decided; and it is by Act of Parliament determined that the affirmance of a decree of the Master of the Rolls, or one of the Vice-Chancellors, by the Court of Appeal, is just the same as if it had been so decided by the full Court. I think it is clear *619 that that has been so settled. Lord Justice KNIGHT *BRUCE, in affirming the decision of the Master of the Rolls in *Shaw* v. *Bunny*, decided in favour of the mortgagee's title, "there being no special circumstances" to prejudice his right: the only question is, whether there are any special circumstances here to vary the general rule.

Now the special circumstances relied on were these: First, the mortgagee was in possession. That makes no difference; being in possession could only make a difference if it created an obligation between the mortgagee and the mortgagor which would not have existed if he had not been in possession. Nothing of the sort is suggested; no duty arises on being in possession, except, certainly, to account to the mortgagor in a way onerous to the mortgagee; but there is no duty which would prevent the relation

[1] 2 Sugden V. & P. (8th Am. ed.) 688, note (*n*).

between the mortgagee and his mortgagor different from what would have existed if he had not been in possession.

Then it was suggested that this was not strictly a mortgage at all, that it was merely a conveyance in trust to sell. It is true that it is in form a conveyance in trust to sell, but as between the mortgagor, the person conveying, and the person to whom it was conveyed in trust to sell, it certainly was a mortgage as far as he was concerned. He took possession, and he taking possession would be liable to account as mortgagee. It cannot be contradicted that between the parties conveying and the parties to whom it was conveyed it certainly was a mortgage. It is possible — I do not say whether that would be so — that there might have been different duties as between him and the mortgagor if he had sold than would have existed in the case of a simple mortgage. But what took place is something that comes in paramount and prior to the exercise of the duties as *trustee; he never *620 can sell, because persons having a paramount title to his title choose to exercise that right, and therefore prevent the possibility of his exercising his right, which is a trust only to arise if it was ever in his power to sell, which it was not, in consequence of the sale made by the prior mortgagees.

That being so, the next special circumstance that is alleged here is, that the parties stood in such a situation that we must take this as a sale at an undervalue. It was not urged, indeed it could not be urged, that here there was any undervalue as between third parties, so as to enable them to set aside the sale; but it was said the relation between these parties made that capable of being considered in a Court of Equity an undervalue which would not have been an undervalue as between strangers. That begs the whole question, because the moment you determine that this mortgagee or *quasi* mortgagee was entitled to purchase, you put him exactly in the position of a common stranger who purchases; so that there is no reason to look at the question of undervalue in a different way from that in which you would have looked at if any third parties had purchased. It would be out of the question to talk of this as an undervalue; it was competed for at an auction. I agree with *Mr. Willcock*, that being sold by auction would not be at all conclusive of the value, but there is no reason to treat this as a sale that was not made in the best manner possible; the vendors had the property valued, and precautions were taken that it should

not be sold at an undervalue; it is perfectly true that shortly after the sale it would seem that the persons who had purchased had so far made a good bargain, — it was a very speculative sort of property, — that they had an opportunity of selling it at an advance of 1000*l.*, but that is * quite immaterial, and I think, if that objection were to prevail, no sale could be safe, if after lying by for eleven years it was afterwards to be suggested in this way that the property was sold at an undervalue. I think, therefore, that the suggestion of undervalue fails entirely, and that that is not a matter that ought to influence my judgment. I think the decision of the Vice-Chancellor perfectly right, and consequently that this appeal ought to be dismissed with costs.

*621

THE ATTORNEY-GENERAL *v.* ST. JOHN'S HOSPITAL, BEDFORD.

1865. February 25, 27, 28. July 3. Before the Lords Justices.

The jurisdiction of the Court of Chancery over the property of corporations affected with a trust applies to purely ecclesiastical as well as to lay corporations.[1]

Where by the charter of foundation of a charity the property of the charity was directed to be applied for the benefit of the poor, the Court enforced the trust, although for several centuries certain fixed payments only had been made to the poor and the surplus rents had been enjoyed by the master.[2]

But where a municipal corporation had for more than three centuries exercised the right of presentation to the mastership of a charity for their own benefit, without acknowledgment of any trust, the Court refused to declare that the right of presentation was affected with a trust for the charity.[3]

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[1] See Angell & Ames Corp. (9th ed.) § 694; Lewin Trusts (5th Eng. ed.), 28; Perry Trusts, § 42; Nelson *v.* Cushing, 2 Cush. 532; Sanderson *v.* White, 18 Pick. 339; 2 Kent, 304.

[2] See Attorney-General *v.* Rochester, 5 De G., M. & G. 797; Attorney-General *v.* Beverley, 6 De G., M. & G. 256. As to the effect of usage as evidence of the trust, see Attorney-General *v.* Murdoch, 1 De G., M. & G. 86, and cases in note (3); Attorney-General *v.* Dublin, 38 N. H. 459; Perry Trusts, § 745; Attorney-General *v.* Ref. Prot. Dutch Church, 33 Barb. 303.

[3] See Perry Trusts, § 745.

THE information in this case was filed against the master and co-brethren of the Hospital of St. John the Baptist, Bedford, the Reverend Henry Pearse, the master of the hospital and rector of the parish of St. John the Baptist, and the mayor, aldermen, and burgesses of Bedford, in whom the presentation to the mastership and rectory was vested, praying for a declaration that the lands held by the master were subject to a charitable trust, and that no part of them belonged to the rectory of St. John's, Bedford; for a scheme for the better administration of the property, having regard to the poor of the town of Bedford, and for the better application of the rents of the property.

The Master of the Rolls, before whom the information was heard, made a decree, declaring, — 1. That the property * of the hospital was impressed with a charitable trust; 2. * 622 That the defendants, the corporation of Bedford, had no power to dispose of the right of presentation to the mastership of the hospital; 3. That a scheme for the administration of the trust property should be settled. (*a*)

The hospital appears to have been founded in the reign of Henry II., but all the earlier documents relating to it are lost. The most important of them was a charter of endowment by Robert de Parys, a copy of which exists in an ancient book of memoranda at Lincoln, dated the 23d January, 1400. The charter as there transcribed is as follows: —

"Memorandum quod Anno Domini DCCCCmo. octagesimo, Robertus de Parys, Fundator Novi Hospitalis Sancti Johannis Baptistæ in villa Bedford ad declaracionem status ejusdem Hospitalis in futurum vult et ordinat quatenus in se est, quod in dicto Hospitali sint duo vel tres Fratres secundum facultatem dicti Hospitalis quorum magis provectus teneat locum Magistri. Qui Fratres simul dicant matutinas et alias horas canonicas et celebrent officia divina pro vivis et pro mortuis singulis diebus secundum statum dicti Hospitalis; et simul eciam comedant in aula et jaceant in Dormitoriis et deferant vesturam honestam et tonsuram presbiteralem cum uno mantello de panno nigro vel de alio colore honesto secundum disposicionem Magistri. Qui eciam Fratres in ingressu suo jurabunt obedientiam Magistro prædicto, et quod stabunt in

(*a*) The case is reported 12 W. R. 1045.

eodem Hospitali ad terminum vitæ suæ psallentes et orantes pro anima dicti Roberti de Parys Fundatoris, et pro animabus Johannis et Henrici de Sancto Johanne, et Johannis nepotis ac eciam (? eorum) qui redditus vel possessiones eidem Hospitali * 623 dederunt, seu dabunt in futurum. Vult eciam * et ordinat prædictus Fundator quod omnes inopes qui sunt de libera procreacione prædictæ villæ in qua idem Hospitale situatur, si ad illam inopiam per infortunium et absque culpa sua devenerint, et petant sustentacionem, caritatemve, in eadem domo recipiantur per magistrum et confratres, universis inopibus extra villam Bedfordiæ procreatis omnino repulsis. Nec licebit Majori nec Ballivis Bedford nec Burgensibus ejusdem villæ aliquem inopem ad dictum Hospitale præsentare priusquam mihi seu successoribus meis fuerit præsentatus, et cum voluntate mea vel successorum meorum erit recipiendus. Et quod omnes excessus eorundem fratrum, intra septa Hospitalis prædicti commissi vel extra, corrigantur et puniantur per magistrum prædictum. Et si fratres in correccione prædicta rebelles inventi fuerint per episcopum corrigantur. Vult eciam et ordinat prædictus Fundator quod ad omnes articulos supra-scriptos tenendos et firmiter observandos quilibet frater in ingressu suo præstet juramentum corporale. Et eciam vult et ordinat prædictus Fundator quod copia istius ordinacionis pro infortunio incendii, vel alio quocumque, remaneat in communi cista villæ prædictæ et irrotulatur penes Majorem et Ballivos qui sunt et pro tempore futuro erunt, ad majorem hujus rei securitatem. Et ad omnia et singula in ista ordinacione contenta et firmiter tenenda præsentibus sigillum meum est appensum."

The authenticity of the date at the head of this charter was questioned; and the Master of the Rolls was of opinion that the charter was an authentic document, but that the date had been erroneously altered by the copyist from 1280, which his Honor considered to be the correct date, to 980.

The constitution and history of the hospital and the cir- * 624 cumstances which gave rise to the present contention * will most conveniently appear from the following statement of them in the judgment of the Master of the Rolls: —

"According to this document the hospital was endowed and established for the support of two or three brethren, of whom the

more advanced was to be the master, and also for the relief of free-born inhabitants of the town of Bedford in needy circumstances, to be presented to them for that purpose. It provides for their mode of living and their dress. It appears, however, by this document that although Robert de Parys is styled *Fundator novi Hospitalis*, three other persons had endowed the hospital with possessions, who were all dead. It appears also by documents, to which I have already referred, that in truth it had been founded in the reign of Henry II., but I cannot, I think, allow this circumstance to destroy the statement made in the charter or the unavoidable inference to be drawn from it. Robert de Parys had the power to declare what were the objects for which the hospital was founded, and the laws by which it was to be regulated. Proceeding on this conclusion, and considering this to be a correct account of the objects of the original foundation, it follows that if the charter has not been lawfully superseded by any subsequent act or proceeding, the whole hospital was given at that time for charitable purposes, and that its possessions were to be so applied. It also follows as a necessary consequence that the subsequent endowments, unless otherwise specified by their respective grantors, were to be applied for the same purposes. This view is confirmed by many subsequent endowments which were made. 'Deo et Hospitali Sancti Johannis Baptisti et fratribus ibidem, Deo servientibus,' and in some 'In sustentationem pauperum prædicti Hospitalis.' In the taxation of Pope Nicholas, in the time of Edward I., which omits all notice of eleemosynary institutions, this hospital is not mentioned, although its existence at that time is proved * incontestably. * 625 From the earliest time that any mention is made of the parish of St. John, it appears to have been attached to the hospital itself. Whether it was a rectory or a vicarage, if both the great and the small tithes were taken by the master and brethren, and, if they performed the ecclesiastical and parochial duties attached to the parish, was not a matter which would be kept very distinct; it was practically immaterial.

"The earliest notice of it in the papers before me is in an entry in the episcopal records of Lincoln in the year 1209, where it is entered among the benefices belonging to the archdeaconry of Bedford as 'a vicarage in the church of St. John, Bedford, which belongs to the brethren of the hospital of the same town.' If the great tithes were taken by the master as parts of the endowment

of his office, this would be quite correct; but as the parochial duties would be performed by the master or by one of the brethren, the distinction between a rectory and a vicarage might easily have faded away. Accordingly in the return made in the Rolls for the augmentation office it is thus stated: 'The hospital of St. John in Bedford was founded by Robert of Parys to the intent to find a master and priest to sing and pray for the soul of the said Robert Henry St. John and others which should be hereafter benefactors of the said hospital. The church of the said hospital is the parish of itself, and there belongeth to the same about eighty-nine houseling people, and the said master or incumbent of the said hospital is the parson and serveth the cure there, and there is none other parson or curate to minister unto the said parishioners there at times of visitation, but the said master and chaplain,' then it proceeds to give the value of the lands, and afterwards says, 'There have been no lands, tenements, or other hereditaments de-
* 626 prived from the said hospital since the 4th day of * February in the twenty-seventh year of the King's reign, albeit, as it is said, the predecessors of the incumbent there have put away of the possessions which sometime did belong or were parcel of the said possessions, but in whose time or what the value thereof was or the intent thereof cannot be known.' For a hundred years (from 1280 to 1374) the master was regularly elected by the brethren, which is a clear proof of the existence of such persons as brethren, either residing in or belonging to the hospital up to the year 1374, when John Appeland was elected. When he vacated the office of master does not appear, but it is after an interval of seventy years that the next appointment of master is recorded. This took place in June, 1444. This was on the presentation of the mayor of Bedford. From that time to the present the presentations have always been made by the mayor of Bedford. How this right became vested in him does not appear. It might have happened that the first mayor who appointed a master was one of the brethren of the hospital, and that subsequently this right was supposed to be vested in the mayor in that character. It may have been that, during the time of Henry VI.'s reign, the brethren had disappeared, and the mayor assumed a function which no other person was capable of performing. It may also have been by some grant from the Crown; if it was by royal grant, all trace of it has disappeared: we are, therefore, left to speculate

as to the most probable mode by which the patronage became vested in the mayor. The subsequent appointments during the remainder of the reign of Henry VI. seems to have partaken of the agitation which was then pervading the country, and from the beginning of June, 1444, till the end of August, 1461, when Edward IV. was King, a period of seventeen years, no less than nine elections of masters of the hospital took place — a clear proof that some of the vacancies were compulsory. * Down * 627 to the election of John Strynger, which took place in Henry VIII.'s reign, in 1530, the master took an oath to observe the ordinances of the hospital. Since that time the oath has been discontinued. The presentation was made by the mayor or by the mayor and burgesses. The person selected was appointed sometimes to the mastership alone, and sometimes he is styled master or rector, and sometimes the presentation is to the hospital or parish church. In all cases the mayor presents *ratione officii*, and nowhere does it appear that the mayor was a brother of the hospital, but up to this time, that is, to the appointment of Strynger in 1530, the trusts of the original foundation are strongly impressed on the hospital and on its possessions. Nothing that has occurred since removes, or indeed, in my opinion, tends to abrogate or diminish, the trusts so imposed. It is not, I think, necessary to go into any detailed enumeration or consideration of the facts connected with the subsequent history of the hospital. The result generally may be shortly summoned up to this effect: a person of the name of Conyers obtained a grant from Queen Elizabeth of the reversion in the right of nominating the master on the next vacancy, on the assumption that the hospital was a charity which had become vested in the Crown under the Statute of Chantries, 1 Edward VI. The interest of Conyers, such as it was, became vested in Williams, who was mayor of Bedford in the reign of James I., and he, and after him several persons deducing title through him, claimed the right of nomination of a clerk to the mastership as their private property under the grant of the Crown. The decision of the Courts was uniformly against all such claimants. Divers of these cases have been reported. The first is in Cro. Eliz. in 1588. (*a*) Then, again, it appears to have been heard in 1616, in the reign of James I., of which copies of

(*a*) 2 Cro. Eliz. 790.

* 628 the records are * produced; and, again, it was heard in the time of Lord HARDWICKE, in the reign of George II. (*a*) These cases do not, any of them, decide the case before me, but they are brought forward apparently to establish this conclusion; namely, that as Williams and his descendants endeavoured to affix a trust on this hospital, under which they claimed to be entitled, and as the Court had in every case rejected the claim and decided against the trust, therefore there is no trust affecting the hospital. The question whether there existed a charitable trust which affected these lands of the hospital in the sense in which it is now brought before me never was raised."

The defendant, the Rev. Henry Pearse, by his answer alleged that the ecclesiastical foundation known as the Hospital of St. John's, Bedford, if not originally annexed to, had for many centuries been annexed to and consolidated with the rectory of the parish of St. John, forming therewith one ecclesiastical benefice; that the foundation was a corporation aggregate, but that the corporation had for some centuries past existed only in name, and that he, the defendant Pearse, was the only member thereof; that the defendant was, upon the resignation of his predecessor, instituted, as to an ecclesiastical benefice, to the rectory of the parish church of St. John the Baptist, with the Hospital of St. John the Baptist, in the town of Bedford; that the defendant had always considered the benefice as purely ecclesiastical, and as free from any payments or trust except certain weekly payments to ten almsmen chosen by the rector for the time being; that in 1850 the governors of Queen Anne's Bounty, after full inquiry, made a loan to the defendant for the purpose of improving the rectory house, on the security of a mortgage of all glebe lands and

* 629 tithes payable to the rector of the living of * St. John the Baptist and master of the hospital; that the property of the rectory and hospital ought to be considered as belonging to one consolidated benefice; that such property from time immemorial had been accustomed to be let upon leases for lives, or for forty years, at ancient yearly rents, the incumbent for the time being receiving for his own use the fines paid upon granting or renewing of leases, and also the rents reserved; that such leases

(*a*) Willes Rep. 608.

had been granted in the name of the master and co-brethren of the hospital of St. John as a corporate body, and under their seal, but had been in fact granted by the rector for the time being, at his sole free will and pleasure; that it had been customary, on affixing the seal of the corporation to any lease, to do so in the presence of two of the almsmen, but that such almsmen had nothing further to do with granting the leases, and did not form part of the corporation.

The defendants, the corporation of Bedford, also put in an answer, which contained the following passage: —

"There is in the town of Bedford an ancient foundation known as an hospital, called the Hospital of St. John the Baptist; of its origin and constitution little can be ascertained with certainty, but it seems to have been founded (or refounded) about the middle of the thirteenth century, on the basis of some similar institution previously existing, and the corporate title of it as refounded appears to be 'The Master and Brethren of the Hospital of St. John the Baptist, in the town of Bedford, in the county of Bedford.' Whether the corporate body of it is or not composed of a master and co-brethren or beadsmen, or of what such corporate body is composed, is a question of great difficulty, on which we are unable to express an unqualified opinion; but it seems clear that the master of the hospital has for some centuries (we believe for five at least, though how long we cannot * precisely say) been the rector * 630 of the parish of St. John's, Bedford, and the parish church of St. John's, Bedford, has during the same period been identical with what is supposed to have been the chapel of the hospital; and in fact we believe that from a time anterior to that at which the line between an ecclesiastical preferment and a charitable institution was clearly defined, the conjoined mastership and rectory has been considered as an ecclesiastical preferment. The so-called co-brethren or beadsmen have had, for many centuries at least, nothing to do with the corporation beyond a mere custom (which perhaps is modern), that two of a number of poor persons, commonly called the beadsmen, who are nominated by and receive small stipends from the master, should be present when leases are granted under the corporate seal; and it is doubtful whether they can be considered as forming part of the corporate body. Hence, in truth, whatever may be the real origin and constitution of what is called

the Hospital of St. John the Baptist, it is impossible now to treat it as a charitable corporation, or as a charity in the ordinary sense of the word. The mastership of it has been from time anterior to legal memory merged in and united with, and has, in fact, become identical with, the rectory of the parish of St. John's, Bedford; while, on the other hand, the corporation, which was in name, and may have been once in fact, aggregate, has substantially become a corporation sole in the person of the rector of St. John's. The extreme antiquity of the institution, and the difficulty of distinguishing in such very early times between charitable and purely ecclesiastical foundations, is greatly increased in the present case by the circumstance, that for a century and a half, commencing in the reign of James I., successive attempts were made to fix upon the institution, or on part of it, a character purely charitable,

which attempts appear to have been supported, in some
* 631 *cases at least, by forgery of documents; and it would seem, even by the forgery of a supposed order of the Court of Exchequer. It can easily be understood, that the very difficult historical questions which arise with reference to the so-called hospital are greatly complicated by the fact, that at least two centuries and a half ago attempts, more or less successful, were made to tamper with the evidences of the original foundation."

Mr. W. H. Black, formerly assistant keeper of public records, filed an affidavit to the following effect: "That he had examined the documents produced in the suit; that there was not among the ancient deeds produced a single grant to the church of St. John's, Bedford, but that they all conveyed and assured to St. John's Hospital only; that prior to the Reformation, the bishops of Lincoln canonically required the successive masters of the hospital to swear obedience; and that the records of the archdeaconry of Bedford, and of the diocese of Lincoln, contained no terrier relating to the church or hospital of St. John's, Bedford, though numerous terriers were found for all the other parishes of the town. The Master of the Rolls, upon the hearing of the cause, made a decree declaring that the property of the hospital was impressed with a charitable trust; that the defendants, the corporation, had no power to dispose of the right of presentation to the mastership of the hospital, and that a scheme for the administration of the property, and future application of the revenues of the charity, should be settled

by the Judge in Chambers; and that the costs of all parties ought to be taxed, and paid out of the funds of the charity."

The defendants, the corporation of Bedford, appealed from the decree of the Master of the Rolls.

The Attorney-General, *Mr. Hobhouse*, and *Mr. T. H. Terrell* appeared in support of the information.

* *Mr. Baggallay* and *Mr. Wickens* appeared for the cor- * 632
poration of Bedford.

The defendant the Rev. Henry Pearse did not appear on the appeal.

The following cases were referred to: *The Attorney-General* v. *St. Cross Hospital*, (*a*) *The Attorney-General* v. *The Fishmongers' Company*, (*b*) *Re Shrewsbury School*, (*c*) and *Adams and Lambert's Case*. (*d*)

July 3.

THE LORD JUSTICE TURNER. — This is an information filed by the Attorney-General, *ex officio*, against the master and co-brethren of the Hospital of St. John the Baptist in the town of Bedford, the Rev. Henry Pearse, clerk, who is the master of the hospital, and also the rector of the parish of St. John in Bedford, and the mayor, aldermen, and burgesses of the borough of Bedford, for the purpose of subjecting to trusts for charity some considerable property alleged to belong to the hospital, which is an ancient foundation in the town of Bedford. The hospital appears, at some very remote period, to have been incorporated by the above-mentioned title, and it has for centuries subsisted, and still subsists, under that title, and has used, and still uses, a common seal. It appears to have originally consisted of a master and two brethren, but in later times there seem to have been a larger number of persons who, though called beadsmen, have assumed to act as brethren. There seems to have been from the earliest times a church belonging to the hospital, and this church has * for many centuries been used as the * 633
church of the parish of St. John, in which the hospital is

(*a*) 8 De G., M. & G. 88.
(*b*) 5 Myl. & Cr. 11.
(*c*) 1 Myl. & Cr. 632.
(*d*) 4 Rep. 104.

situated. For several centuries the offices of master of the hospital and rector of the parish have been held together, the master of the hospital being also rector of the parish. In the early times of the hospital the master appears to have been elected to the office of master by the co-brethren, and to have been instituted to the mastership by the Bishop of Lincoln on their presentation, but for the last 300 or 400 years he has been instituted by the bishop both to the mastership and rectory, on the presentation first of the mayor and subsequently of the corporation of Bedford. He has always on the occasion of his being instituted taken the oath of canonical obedience. There are many grants of land to the master and co-brethren, but only two or three of these grants refer in terms to any charitable purpose. There is no trace of any grant of land or any other grant to or in favour of the rectory of St. John's.

There appears to have been a very long and protracted litigation respecting this foundation in the reigns of Elizabeth and James I., and several commissions of inquiry respecting it appear to have been issued in those reigns, upon which inquisitions were taken. The documents before us leave no doubt in my mind, that throughout these proceedings the foundation was recognized as a charitable foundation. It appears, indeed, that in the course of these proceedings a sum of 12*d.* per week was ordered to be paid by the master and rector to twelve poor men, and payments of about the same amount seem to have been continued to be made up to the present time. We find also from the documents before us, that in the time of Charles II. there was a dispute between the corporation of Bedford and one George Williams, who
* 634 claimed under a grant from * the town respecting the title to the mastership and rectory, and that this dispute led to proceedings *in quare impedit*, in which the corporation of Bedford established their right to the presentation.

The informant's claim to have the property in question subjected to trusts for charity is based upon a charter of one Robert de Parys, the date and authenticity of which is disputed; and the information, after stating this charter and a variety of documents which are relied on by the informant as supporting the title of the charity and leading to the conclusions above mentioned, prays as follows: [His Lordship then read the prayer of the information and the passages in the answers of the defendants the Rev. H. Pearse and the corporation of Bedford before referred to. His

Lordship also stated the effect of the affidavit of Mr. Black and the decree made by the Master of the Rolls, and proceeded as follows:]

The defendants the corporation of Bedford have appealed from this decree, and we are now to dispose of this appeal. It was contended, on the part of the appellants, that the property in question is ecclesiastical property belonging wholly to the church, and that this Court therefore has no jurisdiction over it; that the property is affected by no trust either for the rector or master or for the poor; that the payments to the poor have been and are at the discretion of the rector or master; and that even assuming that they are not merely discretionary payments, they must be measured by the amounts which have been ordinarily paid, and the jurisdiction of this Court would not extend beyond securing those payments. The points thus contended for, on the part of the appellants, strike at the very root of this information; and certainly, if they are well founded, this decree cannot, in my judgment, * be maintained. We must consider these * 635 points, therefore, and it will be convenient to deal with them *seriatim*.

That this Court has no power over property simply and purely ecclesiastical, and not affected by any trust, any more than it has power over lay property not so affected, cannot, as I conceive, be doubted; but as little as I think can it be doubted, that if ecclesiastical property be affected by a trust, the power and jurisdiction of this Court to enforce and execute the trust attaches equally as it would attach upon lay property similarly circumstanced. The question therefore upon the first part of the appellants' contention must, as it seems to me, be not whether the foundation of this hospital was an ecclesiastical or lay foundation, and I am disposed to think that it was an ecclesiastical foundation: but whether the property belonging to this hospital is or is not subject to a trust; and this question again depends, as I think, upon the authenticity and effect of the charter of Robert de Parys. The authenticity of this charter was disputed on the part of the appellants in the course of the argument before us. It was suggested, on their part, that it was a forged instrument; and it was said that Robert de Parys, who was the master of the hospital, although he may have had power to lay down rules for the government of the hospital, could have no power to regulate the terms of the founda-

tion. But upon examining the documents before us, it is evident that Robert de Parys has been throughout treated as the founder of this hospital. He is mentioned to have been so in the surveys taken in the reigns of Henry VIII. and Edward VI., and he is found to have been so in the inquisition taken in the time of James I.; and as to this very charter, the copy of it contained in the register at Lincoln is certified to have been collated with
* 636 the original. * There cannot, therefore, as it seems to me, be any reasonable doubt as to the authenticity of the charter. And as to the power of Robert de Parys to make the charter, it is to be observed, that from the contents of the charter there is every reason to believe that the foundation made by it was based upon an older foundation, and that, independently of the recognitions of the charter, it would be most unsafe to presume that Robert de Parys had no power to make it in the absence of the proof, which no doubt has been lost in the lapse of ages, of the object and terms of the older foundation. Then as to the effect and operation of this charter of Robert de Parys, it is in these terms: [His Lordship read the charter.] Now, the effect and operation of this charter was, as I apprehend, this; that all the property then belonging to the hospital, and all the property which it might afterwards acquire and which might not be directed to be applied to other purposes, was to be applied to the purposes specified in the charter, and amongst those purposes for the benefit of the poor to whom the charter refers; and accordingly we find, that in all the proceedings relating to this foundation, some provision has been made for the poor; and in the inquisitions taken under the commission for charitable uses, we find that the property there mentioned was conveyed to the master and rector of the hospital and rectory and his successors, "to the intent that the same, and the rents, revenues, issues, and profits thereof, should be perpetually disposed, employed, applied, and bestowed by the masters and rectors of the said hospital and rectory for the time being, for and towards the maintenance of the said master and rector, being a preaching minister for the said parish of St. John the Baptist, and for and towards the clothing and relief of poor aged men of the town of Bedford aforesaid, presented by the corporation of
* 637 the said town of Bedford, and other good * and charitable uses." That only sums of fixed amount have for a great length of time past been paid to the poor cannot, in my opinion,

make any difference. The trust being clear, this Court must execute it, and cannot be bound by the course which has been pursued in the distribution of the income between the objects of the charity. For these reasons I entirely agree in the first declaration contained in this decree.

With all respect to the Master of the Rolls, however, I cannot see my way to support the second declaration contained in the decree, that the right of presentation to the mastership of the hospital vested in the corporation of Bedford is held by the corporation on the same trusts. The mastership of this hospital has now for above 400 years been united to the rectory of St. John, and I should feel great difficulty in making a decree, the effect of which would be to sever this union; for if the corporation be trustees for the hospital of the right to present to the mastership, they would, as I apprehend, be bound to present the nominee of their *cestuis que trust*, whilst the right to present to the rectory would belong to them in their own right; but, independently of this difficulty, there is another which appears to me to be insuperable. The corporation of Bedford, in one form or another, has had and exercised the right to present to the rectory and mastership for more than three centuries and a half, and without, so far as I can find, any acknowledgment or recognition of any trust being reposed in them or any interference whatever on the part of the hospital or those interested in it. They even sold the next presentation to the hospital as early as the time of Edward VI. It is true that the right of presentation to the mastership appears, in very early times, to have belonged to and been exercised by the co-brethren; but, even then, the right does not appear at all times to have been exercised * without qualification, for, on one * 638 occasion, the license of the patron to elect appears to have been first asked. There is no doubt much obscurity as to this part of the case; but certainly I am not prepared, after so great a lapse of time, to say that the corporation are trustees of this right of presentation. Lord HARDWICKE'S decree, on which the respondents relied as to this part of the case, so far as it can be considered to affect the question at all (which I do not think it does, as upon the supplemental bill filed in that case, the sole question was between the corporation and Williams), seems to me to be more in favour of the appellants than of the respondents, as the decree gave the rectory and mastership to the presentee of the corpora-

tion. I think, therefore, this second declaration must be struck out, and perhaps the best mode of setting the decree right, in this respect, will be to introduce into the first declaration the words "but not including the right of presentation to the mastership and rectory."

As to the third declaration, nothing was said upon it in the course of the argument before us, and it is unnecessary, therefore, for me to say more than that I think that it is right. Subject to the alterations above suggested, I think this decree must be affirmed, and, having regard to the very great difficulty of the case, I think we may properly follow the precedent set up by the Master of the Rolls, and order the costs of all parties of this appeal to be paid out of the estate.

THE LORD JUSTICE KNIGHT BRUCE.—I agree.

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*639 *GALLOWAY *v.* THE MAYOR, COMMONALTY, AND CITIZENS OF THE CITY OF LONDON. (No. 2.)

1865. March 27. April 27, 28, 29. May 2, 9. Before the LORDS JUSTICES.

The corporation of London in 1862 obtained an Act authorizing them to make a new street and buy land for that purpose, with certain powers of reselling land not required for the street. About the same time a railway company obtained an Act authorizing the company and the corporation to enter into agreements for the sale of land by the corporation to the company. Shortly before either Act had passed the corporation entered into an agreement with the company to take under the powers of their Act and sell to the company certain lands including land of the plaintiff. The plaintiff filed his bill to restrain the corporation from taking his land on the ground of this agreement, and obtained an injunction. After this another Act was passed authorizing the corporation to take lands for another undertaking; and by this Act, after reciting that certain lands might be taken under it which were liable to be taken by the corporation under their former Act, and with respect to which an agreement was "under the authority" of that Act and the Railway Act entered into between the corporation and the company, and that it was expedient "that the rights of the company under such agreement should be preserved," it was enacted that nothing in the present Act should prejudice "the rights of that company under the said agreement," but that all the provisions of the agreement should be as applicable to the lands if purchased under the powers of the present Act as they would have been if they had

been purchased under the former Act. The plaintiff's land was liable to be taken under this latter Act.

Held, by the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls, the Lord Justice TURNER dissenting, that the legislature had by the latter Act recognized the validity of the agreement, and that the agreement was therefore no obstacle to the corporation taking the land of the plaintiff under the latter Act.[1]

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls, dismissing his bill with costs.

The bill prayed for a declaration that the corporation of London were not empowered by the Holborn Valley Improvement Act, 1864, to take compulsorily certain property of the plaintiff for the purpose of making it over to the Metropolitan Railway Company, in pursuance of an agreement dated the 26th of June, 1862, or for any other purpose than the erection of the works authorized by the said Act, and for an injunction to restrain the corporation from proceeding on a notice to treat of the 30th of July, 1864, and it prayed that the suit might be taken as supplemental to a former suit between the same parties relating to the same property.

* An appeal in the former suit from an order of Vice- * 640 Chancellor WOOD, refusing an injunction, is reported, *supra*, p. 213, where the facts of that case are fully stated, and it will only be necessary to add the facts which occurred subsequently to the order of the Lords Justices, which restrained the corporation from taking the plaintiff's property under a notice given in pursuance of the powers conferred on them by the Metropolitan Meat and Poultry Market (Western Approach) Act, 1862; the ground of the decision being that the corporation having entered into the agreement above referred to of the 26th of June, 1862, to sell a considerable part of the property to the Metropolitan Railway Company, were not *bonâ fide* exercising their powers for the object of their Act, but for an object for which those powers were not conferred.

On the 23d of June, 1864, was passed the Holborn Valley Improvement Act, 1864, 27 & 28 Vict. c. 61, which empowered the corporation to take lands for the purposes of the improvements thereby authorized. The plaintiff's property was within the limits for taking lands, and was clearly liable to be taken if wanted for

[1] This decision was affirmed in S. C. L. R. 1 H. L. 34. See Galloway *v.* Mayor, Aldermen, and Commons of the City of London, *ante*, 213 and notes.

the purposes of the Act. The Act contained no clause enabling the corporation to dispose of superfluous lands, except that it incorporated the London (City) Improvement Act, 1847 (10 & 11 Vict. c. 280), which contained the limited powers for that purpose, which are mentioned in the report of the previous case, *supra*, p. 214. The 37th section of the Holborn Valley Improvement Act was as follows:—

"And whereas certain lands may be taken under the powers of this Act, which were delineated on the plans and described in the books of reference mentioned in the 4th section of the Metropolitan Meat and Poultry Market (Western Approach) Act, 1862,
* 641 and in respect * of which lands an agreement was, under the authority of that Act and the Metropolitan Railway Acts, entered into between the said mayor, commonalty, and citizens and the Metropolitan Railway Company, and it is expedient that the rights of that company under such agreement should be preserved: therefore nothing in this Act contained shall prejudice or affect the rights of that company under the said agreement, but all the covenants and provisions thereof shall be as applicable to the same lands, if purchased under the powers of this Act, as they would have been if they had been purchased under the powers of the said Metropolitan Meat and Poultry Market (Western Approach) Act, 1862."

On the 28th of July, 1864, the injunction granted by the Lords Justices in the former suit was made perpetual by Vice-Chancellor Wood at the hearing of the cause.

On the 30th of July, 1864, the corporation served the plaintiff with a notice to treat under the Holborn Valley Improvement Act, reserving, however, by the notice, all their rights under the Metropolitan Meat and Poultry Market (Western Approach) Act, 1862, and their notice under that Act.

In October, 1864, the plaintiff filed his present bill, alleging that no purpose for which the plaintiff's property was wanted was stated by the corporation, that they did not want it for the purposes of the Holborn Improvement Act, and that they were seeking to acquire it merely for the purpose of carrying into effect the agreement of the 26th of June, 1862. The corporation admitted by their answer that they did not know that they should want the

plaintiff's property for any purpose connected with the Holborn Valley improvements.

*The Master of the Rolls held that by the 37th section *642 of the Holborn Valley Improvement Act the legislature had in effect declared the agreement of June, 1862, to be a valid agreement, and had moreover, with the knowledge that the corporation had fettered their discretion by it, renewed their power to take the property in question. His Honor considered that the legislature had thus withdrawn the case from the consideration of a Court of Equity, and he dismissed the bill with costs.

March 27.

Mr. Rolt, *Mr. Selwyn*, and *Mr. Bagshawe*, for the appellant. — The present case differs from the former in two points: first, the introduction of section 37 of the Holborn Improvement Act; secondly, in the omission from that Act of any such general power of selling superfluous land as was contained in the Act of 1862 (25 & 26 Vict. c. 174, § 20). The corporation are thus thrown back upon the selling power contained in the incorporated Act of 1847 (10 & 11 Vict. c. 280), under which they cannot sell land without first building on it. Unless, therefore, they can make out their case under the 37th section, they are in a worse position now than they were on the former occasion. But the 37th section does not profess to give the agreement of the 26th of June, 1862, any further efficacy than it had before. That agreement, as it stood, would not have applied to a purchase under the present Act; it therefore was provided by the 37th section that it should so apply, but the section does not express and cannot be understood to imply that it should apply otherwise than with whatever defects it might have, there not being a word expressing an intention either to validate or invalidate it.

[THE LORD JUSTICE KNIGHT BRUCE. — Is there any objection for want of parties?

Sir Hugh Cairns. — We object that the railway company ought to be here.]

We contend that the company are *not necessary parties; *643 we have nothing to do with them. The question simply is,

have the corporation power to take our property or not? That they have agreed to sell it to the company cannot give to the company such an interest as to make them proper parties to the suit, any more than a sub-purchaser would be made party to a specific performance suit. The former suit proceeded to a final decree in the absence of the company, and this suit stands in the same position. We are not arguing the question whether the agreement is good or bad; if we were, the railway company might have a right to be here; but that is a question with which we have nothing to do, the only question being, whether the corporation can take our property, which it is admitted that the railway company cannot do directly. It would be a very bad precedent to hold that in a contest with a railway company, as to its power to take certain lands, all the parties to whom the company may have agreed to resell parts of it must be made parties.

THE LORD JUSTICE KNIGHT BRUCE. — My impression is that the Metropolitan Railway Company ought to be here.

THE LORD JUSTICE TURNER. — I also am inclined to think that the Metropolitan Railway Company are necessary parties. The case does not seem to me to be governed by any analogy to that of sub-purchasers in suits for specific performance.

The decree was discharged without prejudice to any question, and liberty given to amend the bill by making the Metropolitan Railway Company parties. This having been done, the case came on again for hearing.

April 27, 28, 29.

* 644 * *Mr. Rolt* and *Mr. Bagshawe*, for the plaintiff. — The Act of 1864 does not validate the agreement. If it does not, the corporation cannot take, under that Act, for the purposes of the agreement, since the Act gives them no power to sell land without first building on it, and if they revert to the Act of 1862, they are met by the decree in the former suit.

The Attorney-General (Sir R. PALMER), *Mr. Jessel*, and *Mr. Bristowe*, for the Metropolitan Railway Company. — The case now is entirely different from that in the former suit. If the Court now

interferes it will be saying that the powers given by an Act which recognizes the agreement of 26th June, 1862, are not to be exercised because that agreement has been entered into. The former decision in this Court was, however, only on an interlocutory application, and was come to in our absence. We are not precluded at the hearing from rearguing the question, and we contend that, even apart from the effect of the Holborn Valley Act, the present bill was rightly dismissed. At the time when the agreement was entered into, the corporation had not power to take the property in question, but we had power to take it compulsorily. 17 & 18 Vict. c. 221; 22 & 23 Vict. c. 97, §§ 9, 10, 11. The agreement, therefore, imposes no burden on the land-holder, for if this agreement had not been entered into, the railway company would have given notice to take the property. The former of these two Acts gave the railway company power to contract with the city. The agreement was in furtherance of the object of the Act, and was good, though made before parliamentary powers for carrying it into effect had been acquired. *Great Western Railway Company* v. *Birmingham and Oxford Junction Railway Company*. (*a*) The *decision in *Edwards* v. *Grand Junction Railway Company* (*b*) has been qualified by *Caledonian Railway Company* v. *Magistrates of Helensburgh* (*c*) and *Preston* v. *Liverpool, Manchester, &c. Railway Company*; (*d*) but only to this extent, that the contract made by promoters before the Act is not binding on the company, if it be one which if made after the Act would be *ultra vires*, and that the contract of the promoters before incorporation does not bind the company after incorporation, unless the company interferes with the lands to which it relates. The present case is governed by *Eastern Counties Railway Company* v. *Hawkes*, (*e*) which shows that an agreement like this, pending an application to Parliament, is valid. Now, as to its affecting the rights of the corporation against land-holders, the corporation had power to take land at their discretion for the purpose of resale, and it was a wise and unobjectionable course to secure a good purchaser beforehand. The argument as to the discretion of the company being fettered, was urged unsuccessfully in *Hawkes's Case*. The dismissal of this bill, then, would be right, even if the 37th

*645

(*a*) 2 Phill. 597, 604.
(*b*) 1 M. & C. 650.
(*c*) 2 Macq. 391.
(*d*) 5 H. L. Cas. 605.
(*e*) 5 H. L. Cas. 331.

section of the Holborn Valley Act were out of the case. But that section is decisive. The Act was passed with full notice of the agreement, and yet confers fresh power to take this property, and provides that the agreement is to apply to it when taken under this Act. It is true that it does not in terms confirm the agreement; but it treats it as valid, treats it as giving rights, and states that it is expedient that these rights should be kept on foot. It is stultifying the legislature to say that it kept on foot the rights under a void agreement. Moreover, the section applies the agreement to lands, which were not originally within its operation. The * 646 plaintiff's construction takes away * from the city power to take lands under this Act, because the city has entered into an agreement which the Act recognizes. The recital in the 37th section amounts to a legislative declaration that the agreement was duly entered into under the authority of the Acts. The discretion of the corporation as to what it would buy could be entered into as well before as after its acquiring parliamentary powers, and its discretion could lawfully be exercised with a view merely to obtaining land to be resold at a profit.

Sir H. M. Cairns and *Mr. Swanston*, for the corporation of London. — The Holborn Valley Act incorporated the Lands Clauses Act, and under section 127 of the latter Act the corporation could sell superfluous land without resorting to the power given by the Act of 1847; the powers are cumulative. That the corporation should agree to sell before obtaining power to purchase was consistent with the scheme of their Acts, which differ from ordinary Acts authorizing incorporated bodies to take land, inasmuch as one of their objects was to enable the corporation to make profits by selling land, and to acquire land for that purpose. The whole case was before Parliament, and the argument of the appellant is, that the powers given by the Act cannot be exercised because of the existence of an agreement of which the legislature had full notice when the Act was passed, and which is in fact recognized by the Act as valid.

Mr. Rolt, in reply. — Before the Holborn Valley Act the corporation had no power to sell to the railway company, they had only power to buy, to grant building leases of what they did not want for the new street and then sell the reversion, and the

Holborn Valley Act gives no further powers. * It is doubt- * 647
ful whether the power of sale in the Lands Clauses Act is incorporated; but if it is, that power of sale is inapplicable, the direction to sell being "within ten years after the completion of the works." Here the corporation are taking only for the purpose of selling to the railway company, they are therefore taking for a purpose not authorized by their Acts. Assuming the doctrine of *Edwards* v. *Grand Junction Railway Co.* (*a*) to have been modified so far only as argued by the Attorney-General, that case does not affect the present, which is the case of an agreement to do something affecting the rights of a third person not a party to the agreement. The corporation, under the Holborn Valley Act, §§ 9, 10, must exercise a discretion, their authority being only to take sufficient land for the class of buildings they may determine on; they have, by the agreement of June, 1862, prevented themselves from exercising this discretion, and they could not exercise it before their statutory powers were conferred on them. Then, as to sect. 37, it is proved that the committee refused to frame the clause so as to validate the agreement; and if it had been intended to place the agreement on a better footing, such an intention would have been expressed. The sole object of the clause is to transfer the agreement for what it was worth from one property to another, and the recital that the purchase was made under the authority of the Acts cannot fairly be construed as meaning any thing more than that it purported to be made under that authority.

Judgment reserved.

May 9.

* THE LORD JUSTICE KNIGHT BRUCE. — During and since * 648
the argument in this case before us after the amendment of the bill (an amendment by which the Metropolitan Railway Company were added as parties defendants to the suit), my attention has been more closely and fully addressed to the 37th section of "The Holborn Valley Improvement Act, 1864" (the 27 & 28 Vict. c. 61, passed on the 23d June, 1864), than it had been previously; and upon consideration, I am of opinion that, properly construed, it has the effect of removing the objection, which, as I thought on the occasion of hearing a motion by way of appeal

(*a*) 1 My. & Cr. 650.

from an interlocutory order made in another cause by the Vice-Chancellor WOOD, arose from the contract of the 26th June, 1862, between the present defendants to the present cause. My view is that the legislature has recognized the validity of that contract, and removed the objection, if any, which would otherwise have arisen to the power of the corporation of London to serve on the plaintiff effectually the notice of the 30th of July, 1864, stated in the 19th paragraph of his present bill.

It may not unreasonably be, and has been, contended that the words "under the authority" comprised in the 37th section conclude nothing, and that the expression "the rights" contained twice in it should be read as equivalent to "the rights, if any." That, however, is not my impression. It seems to me that the words "under the authority" are not rendered unimportant by the date of the contract (four days before the 30th June, 1862), but are material; that the words "the rights," properly interpreted, mean and recognize actually existing rights, and that this view is confirmed by the final words of the section, namely, "but all the covenants and provisions thereof shall be as applica-
*649 ble to the same lands, * if purchased under the powers of this Act, as they would have been if they had been purchased under the powers of the said "Metropolitan Meat and Poultry Market (Western Approach) Act, 1862."

On the ground, therefore, of that 37th section, printed in page 12 of the bill now before us, I am of opinion that the plaintiff's case fails, and that his present bill must be dismissed, but without costs.

THE LORD JUSTICE TURNER. — My learned brother's opinion agreeing with the opinion of the Master of the Rolls, as to the construction of the 37th section of the Act of 1864, it is unnecessary for me to give any opinion upon this case. I say no more, therefore, than that I do not find myself able to agree in the construction put upon this 37th section and that the argument before us upon this occasion has not satisfied me that the conclusion at which we arrived in the former suit instituted by this plaintiff, although it may, to some extent, have been founded in error, as to one of the facts of the case, was, in substance, erroneous. My learned brother agreeing in opinion with the Master of the Rolls, the appeal of course must be dismissed.

* In the Matter of The ADELPHI HOTEL COMPANY, * 650 LIMITED.

BEST'S CASE.

1865. May 26. Before the LORDS JUSTICES.

B. applied for twenty shares in a joint-stock company registered under the Acts of 1856 and 1857, paid a deposit of 10*s*. per share upon them and signed a letter of application agreeing to accept the twenty shares or any less number that might be allotted to him. The applications for shares were so few that the company never commenced operations, and after rather more than a year an order was made for winding it up. The directors had retained B.'s deposit and used it, and he had never applied for the return of it, but no allotment of shares was ever made either to him or to any of the other applicants. *Held*, reversing the order appealed from, that B. was not a contributory.

THIS was a motion by Mr. Best to discharge an order of the Master of the Rolls, including his name in the list of contributories.

The company was formed in the year 1862, and registered in September, 1862, as a limited company under the Joint-stock Companies Acts, 1856 and 1857. The capital was 150,000*l*. in 15,000 shares of 10*l*. each, "10*s*. payable on application and 1*l*. on allotment." The prospectus contained the following provision as to applications for shares: —

"Applications must be made in the annexed form, and forwarded with a check or post-office order for the deposit to the bankers of the company, or to the secretary at the temporary offices of the company."

The annexed form of application was as follows: —

"To the directors of the Adelphi Hotel Company, Limited.

"Gentlemen, — Having paid the bankers of the company the sum of £ , being a deposit of 10*s*. per share upon shares,

[1] See Gunn's Case, L. R. 3 Ch. Ap. 40.

I request you will allot me shares in the above-named company, and I agree to accept the same, or any less number that
* 651 may be allotted to me, and to * pay the calls thereon as they may be made; and I hereby authorize and empower you to insert my name in the register of shareholders of the company for the number of shares which you may allot to me.

"I am, &c."

"Dated the day of , 1862."

"NOTE. — This form must be delivered entire to the bankers of the company, who will tear off and retain the form of application for shares, sign the receipt and give it to the applicant to hold.

"If it is not convenient to make the deposit with the bankers of the company, the entire form may be sent to the company's office by post, accompanied by a crossed check or post-office order for the amount of the deposit, when the amount will be paid into the bank and the receipt forwarded to the applicant. Post-office orders and checks must be made payable to the secretary.

"Bankers' Receipt.

"Received this day of , 1862, for the directors of the Adelphi Hotel Company, Limited, from of the sum of on account of shares in the said undertaking."

On the 10th of October, 1862, Mr. Best applied for twenty shares by filling up the above form and sending it to the secretary with a check for 10*l*. On the following day the secretary wrote to Mr. Best as follows: "Herewith you have the bankers' receipt for the deposit on twenty-two shares in this company." The two shares were shares applied for by a Mr. Thomas Best. The bankers' receipt was on the above form, with the blanks properly filled up.

A list of persons who applied for shares in the company
* 652 * was kept by the secretary, and Mr. Best's name was entered in it.

The total number of shares applied for was only 476. The undertaking having thus become abortive, no allotment of shares ever took place. Mr. Best's deposit was retained and used by the company, and he never applied to have it returned, nor in any way sought to withdraw his application to take shares.

On the 7th day of November, 1863, an order to wind up the company was made on the application of one of the persons who signed the memorandum of association.

The Master of the Rolls held that Mr. Best ought to be on the list of contributories. The following is taken from a short-hand note of his Honor's judgment: —

"I think that Mr. Best was a shareholder to the extent of the shares for which he applied and on which he paid the deposit. I am very much disposed to think that the only question is, whether he is liable to the full extent of the debts incurred in the formation of the company with other persons, or whether he is only liable to the limited amount for which he subscribed. He has authorized certain persons to take steps to form a company, upon the faith that he will take twenty shares of 10*l.* each, — that is to say, that he will contribute 200*l.* for that purpose, and I think it is impossible for him afterwards to say that he is not liable for all the debts which have been incurred by reason of that. It is true that there is no allotment of shares, but I do not think that material, for if a certain number of persons join together for the purpose of forming a company and agree among themselves to take a certain number of shares and incur debts for that purpose, and then find that they cannot establish the company, they
* must pay those debts. The only question is, whether * 653
their liability is not limited to the amount subscribed for.
I think that the official liquidator has properly put Mr. Best on the list for the shares which he agreed to take."

Mr. Best appealed from this decision.

Mr. Daniel and *Mr. Elderton*, for the appellant. — The directors never accepted Mr. Best's offer, so there never was a binding contract to take shares. They had a discretion to allot him twenty shares or a less number or none, and they never allotted him any. *Cookney's Case*, (*a*) which was relied on against us below, does not govern this case. The offer to take shares was there followed by an allotment, and so a complete contract was made; the case only decided that a subsequent refusal to execute the deed did not

(*a*) 3 De G. & J. 170.

absolve the allottee from any liability. *Bloxam's Case*, (*a*) also relied on by the official liquidator, is nearer the present case; but there, also, an allotment had been made. The Master of the Rolls appears to have treated a company of this kind as standing on the same footing with a body of promoters who make an ineffectual attempt to form a railway company, as in *Reynell* v. *Lewis* and *Wyld* v. *Hopkins*. (*b*) These cases turn on the doctrine of agency. *Maddick* v. *Marshall*. (*c*) It would be monstrous to hold that a person, by a mere application to take shares, which are never allotted to him, makes the members of the company who executed the memorandum of association his agents for the purpose

*654 of incurring preliminary expenses. There is no *analogy between this and a case of an abortive railway scheme. This is a formed company, incorporated by force of the Act as soon as it was registered. The persons who signed the memorandum of association are shareholders, and no one else is a shareholder or subject to any of the liabilities of one till shares have, after application, been allotted to him. Suppose 30,000 persons had applied for shares, and no allotment had been made, would all these persons be contributories as having agreed to take shares, though they could not all have been made shareholders?

Mr. Baggallay and *Mr. Fry*, for the official liquidator. — This case involves no new principle, but only an application of the familiar principle, that where a person has agreed to take shares he is, for the purposes of winding up, in the same position as if he had taken them. There is no technical rule as to allotment, and it need not be made in any formal way; any appropriation will do. Now here the company took the appellant's money and used it. After having retained it for more than a year, they could not possibly, if the undertaking had turned out a success, have refused to give the appellant the number of shares for which he had applied and paid the deposit. In *Bloxam's Case*, a return of the deposit was stipulated for unless the shares were sent within a few days; this was not done, yet the applicant was held a contributory. The allotment there was never communicated, and the case, in fact, decides, that allotment was unnecessary, for an allotment of which no notice was given to the allottee could not make the

(*a*) 33 Beav. 529; 10 Law Times (N. S.) 772, L. J.
(*b*) 15 M. & W. 517. (*c*) 12 W. R. 687, C. P.

contract more complete than in the present case. The terms of the prospectus are, in substance, that the applicant shall have the shares he applies for, subject only to a power reserved to the directors in their * discretion to give him fewer if they * 655 think fit. This, however, they have not exercised, and, after their long retention of the deposit, they could not have exercised it. As to the question, what would be the case if 30,000 applications for shares had been made, it would in that event have been the duty of the directors to exercise their power of not giving the number of shares applied for; but that state of circumstances has not arisen.

Mr. Daniel, in reply. — In circumstances like those of the present case, the number of applications for shares having been so small that there never was any possibility of starting the company, it became the duty of the directors, as honest men, not to allot any shares, and they have not allotted any. There was no complete contract, and the appellant is not liable.

THE LORD JUSTICE KNIGHT BRUCE. — Whether the law of this country as it at present stands, or is understood and administered, on the subject now before us, is or is not in a strange and inconvenient state, it must be conceded, that in order to make the appellant liable, as he is sought to be made liable, there must have been an acceptance of him as a shareholder, or an allotment or appropriation of shares, which would involve such an acceptance. Now I apprehend, that the mere circumstance of the retention of this gentleman's money by the gentlemen called directors was not such an acceptance. I think that the communication of the receipt by the bankers' clerk did not amount to an acceptance or appropriation, or allotment; and I think, that if the mere retention of the money (silent, except for the receipt) and this receipt, are insufficient, there is no evidence of acceptance, allotment, or appropriation, and * that on failure of such evidence this gentleman * 656 is not liable as he is sought to be made liable.

THE LORD JUSTICE TURNER. — With all respect to the Master of the Rolls I also differ from the conclusion at which he has arrived. The case is confessedly a new one, for in all the previous cases there had been an allotment of shares. The decision of the present

case turns on the question whether there was or was not a binding contract on the part of Mr. Best to take these shares. It is contended that upon the true construction of the words in his letter of application, "I agree to accept the same or any less number that may be allotted to me," the appellant entered into an absolute contract to take twenty shares, unless a smaller number was allotted to him, and, in that event, to take such smaller number. But these words must be construed in connection with the rest of the letter of application, in the latter part of which we find the following clause, "I hereby authorize and empower you to insert my name on the register of shareholders of the company for the number of shares which you may allot me." Taking into account this reference to the number of shares to be allotted by the directors, the meaning of the letter appears to me clearly to be, "I will accept twenty shares if you will allot them to me, and if you allot me less I will accept the smaller number." It was urged that an allotment does not require any formal act to be done by the directors; that any appropriation of shares is sufficient. Whether what is done amounts to an allotment must, I think, be determined according to the circumstances of each particular case. The common meaning of allotment is well understood, the ordinary course of practice being, that notice is given that the company will proceed to
* 657 an allotment, and that no * applications for shares will be entertained after a certain day, and this is followed by resolutions allotting the shares. I cannot agree with the argument that, in all cases, any thing in the nature of an appropriation would amount to an allotment. In the present case I think that the word allotment is to be taken in its ordinary sense of an allotment made with the usual formalities. Looking then at the terms of the application, I am of opinion that, as there never was any allotment to Mr. Best within the proper meaning of that word, there never was any complete contract by him to take shares, and that his name ought to be struck out of the list of contributories.

[512]

COMBE *v.* HUGHES.

1865. May 2, 3. Before the LORDS JUSTICES.

A testator bequeathed his residuary estate to his two sons and his daughter in equal shares. He then directed the shares of his sons to be paid to them as soon as convenient, and directed that his daughter's share should not be paid to her, but that the income should be accumulated during the life of her husband, and upon the death of her husband, should there be any child or children living, the property should be secured for their benefit and that of their mother, but should there be no child or children living then the share might be paid to her for her own use and benefit, but if she died before her share became payable, then he directed it to be held in trust for his two sons. The husband was still living at the expiration of twenty-one years from the death of the testator. *Held*, that upon the accumulations being put an end to by the Thellusson Act, the income became payable to the wife during the joint lives of herself and her husband, the original gift to her remaining in force so far as the trusts by which it was modified were incapable of taking effect.[1]

THIS was an appeal by two of the defendants from part of a decree of the Master of the Rolls, (*a*) the question being, whether certain income, which was released by the Thellusson Act from a trust for accumulation, was undisposed of.

Major-General William Hopper, the testator in the cause, by will dated the 4th of October, 1841, devised and bequeathed his residuary real and personal estate to * his executors, their * 658 heirs, executors, and administrators, upon trust to sell and dispose of and convert into money such parts thereof as might not consist of cash or government securities, and to stand possessed thereof upon the trusts and for the intents and purposes hereinafter mentioned; that was to say, upon trust for his two sons Arthur Quin Hopper and Harman Baillie Hopper and the testator's daughter Eleanor Hughes, wife of the defendant Captain Henry Philip Hughes, and to divide and pay over the same to and among them in such shares and proportions and in such manner that the shares and proportions of each of the said Arthur Quin Hopper and Eleanor Hughes should be less than the share of Harman Baillie Hopper by the sum of 20,000 sicca rupees. The testator then gave directions as to paying the shares of the two sons to them

(*a*) 34 Beav. 127.

[1] See Lassence *v.* Tierney, 1 Mac. & G. 551, and cases cited in note (3).

so soon as conveniently might be after the property was realized. And with respect to the share of Eleanor Hughes, the testator directed that it should not be paid to her, but that a sufficient portion of his government securities, then deposited in the general treasury at Calcutta, should be retained and not sold by his executrix and executors, as might be equal to her share of the rest, residue, and remainder of his estate, effects, and property, and that it might be allowed to accumulate with the growing interest continually added thereto during the lifetime of her husband Captain Hughes, and upon the death of her said husband, should there be any child or children living, that the property should be secured for their benefit and for that of their mother; but should there be no child or children living, then the share of his said daughter might be by his executrix and executors paid to her for her own use and benefit; but provided that if his said daughter should depart this life before her share or proportion in the said residue should become payable, then the testator directed that his said executrix and
* 659 executors should stand possessed thereof for his two * sons, the said Arthur Quin Hopper and Harman Baillie Hopper, equally to be divided among them and their respective heirs, executors, administrators, and assigns. And the testator appointed his wife Margaret Hopper, his friends Major Craigie and Colonel Mackenzie, and his son Arthur Quin Hopper the executrix and executors of his will.

The testator died on the 6th of July, 1843. On the 25th of April, 1862, all the executors being dead, the plaintiffs were, by an order of the Court under the Trustee Act, 1850, appointed trustees of the will.

The income of Mrs. Hughes's share of the residue was duly accumulated according to the trusts of the will up to the 5th of July, 1864, when the period of twenty-one years allowed by the Thellusson Act expired. Captain Hughes being still alive, the question then arose how the income of the original share and the income of the accumulations were to be dealt with, and the present suit was instituted by the trustees to obtain the directions of the Court. Captain and Mrs. Hughes had several children.

The testator's next of kin, according to the Statute of Distributions, were his wife and his three children. Arthur Quin Hopper was dead, and Harman Baillie Hopper and Robert Warren were the trustees of his will. The testator's widow left a will by which

she bequeathed her residuary estate upon trust for Mrs. Hughes for her life, and after her death upon trust as to one-half for her children, and as to the other half for Harman Baillie Hopper, but if he should die without leaving lawful issue, upon trust for Mrs. Hughes's children.

*The Master of the Rolls made a decree, which, so far *660 as need be stated, was as follows: —

"Declare that, having regard to the Act of the 39th & 40th Geo. 3, c. 98, according to the true construction of the will of William Hopper, the testator in the bill named, the accumulations directed by the testator's said will only took effect to diminish for the period of twenty-one years from the testator's death the gift to his daughter Eleanor, the wife of the defendant Henry Philip Hughes, of the share of his residuary estate bequeathed to her; and that the said Eleanor Hughes is, from the expiration of the aforesaid period of twenty-one years till the death of the said Henry Philip Hughes, entitled to the income of the said share and of the accumulations thereof. And the defendant Henry Philip Hughes consenting, order that the plaintiffs, the trustees of the said will, do pay to the said Eleanor Hughes on her separate receipt for her separate use the aforesaid income of the aforesaid share and accumulations, which, since the expiration of the said period of twenty-one years, has accrued, and which shall, during the joint lives of the said Henry Philip Hughes and Eleanor his wife, accrue thereon." The costs of all parties, as between solicitor and client, were given out of the accumulations.

The defendants Harman Baillie Hopper and Robert Warren appealed, insisting that the income, after the determination of the twenty-one years during the residue of the joint lives of Captain and Mrs. Hughes, was undisposed of, and belonged to the testator's next of kin according to the Statute of Distributions, and that a share of the costs ought to have been ordered to be paid out of the income accruing on Mrs. Hughes's share after the expiration of the twenty-one years.

*_Mr. Selwyn_ and _Mr. G. Lake Russell_, for the appellants. *661 It is no part of the object of the Thellusson Act to alter the construction of instruments. On this will there is a clear intention to

exclude both the daughter and her husband from taking any thing during the husband's life, and effect must be given to it. The rents during the husband's life after twenty-one years are undisposed of. *Green* v. *Gascoyne*. (*a*) There is not here an absolute gift to the daughter with subsequent modifications, the first directions being merely for the purpose of ascertaining the share, so the daughter can take nothing but what the subsequent limitations give her. *Griffiths* v. *Vere*. (*b*) The costs ought to be apportioned *pro ratâ* between the accumulated fund and the income which is released by the statute from accumulation. *Elborne* v. *Goode*, (*c*)

Green v. *Gascoyne*. (*a*)

Mr. Hobhouse and *Mr. Cotton*, contra. — There is, in the first instance, an absolute gift to the daughter. This is only modified by the subsequent dispositions, and so far as those dispositions fail of effect, the original gift, which is a gift both of capital and income, remains. *Hulme* v. *Hulme*, (*d*) *Lassence* v. *Tierney*, (*e*) *Kampf* v. *Jones*, (*g*) *Carver* v. *Bowles*. (*h*) The costs have been correctly dealt with. *Eyre* v. *Marsden*. (*i*)

Mr. Selwyn, in reply. — If there is here a previous abso-
* 662 lute gift, it is in part * taken away, not merely modified. *Gompertz* v. *Gompertz*. (*k*)

The Lord Justice Knight Bruce. — Upon the language of the will in this case we must, I think, consider that had it not contained any direction to accumulate income, but had been in other respects as it is, or had it been confined in its direction concerning accumulation expressly to the period of twenty-one years next following the testator's decease, but had been in other respects as it is, the whole income of the share of the residue called by him his daughter's share, would, in the former case from his death, and in the latter from the end of twenty-one years next after that event, have belonged under the will beneficially to his daughter Mrs.

(*a*) 11 Jur. (N. S.) 195, L. C.
(*b*) Tudor's Leading Cases on Real Property, 430.
(*c*) 14 Sim. 165, 179.
(*d*) 9 Sim. 644.
(*e*) 1 Mac. & G. 551, 561.
(*g*) 2 Keen, 756.
(*h*) 2 Russ. & Myl. 301.
(*i*) 2 Keen, 564; 4 My. & Cr. 231, 242.
(*k*) 2 Phill. 107.

Hughes during the whole of the remainder of the lifetime of her husband Captain Hughes. That being, in my opinion, so, I conceive that under the will as it stands, the direction to accumulate being made void by the statute law as from the end of twenty-one years next following the testator's death, the income of the share called the daughter's share, from the end of that term of twenty-one years until the death of her husband, as well of the fund raised by accumulation during the twenty-one years as of the original capital of her share, ought to be treated as belonging to her and as enjoyable by herself.

Such I take to be the effect of the statute as to a will of the present description, agreeing in this, to a certain extent at least, with the view of the Master of the Rolls, who has also, I think, correctly disposed of the costs of the suit in ordering them to be paid out of the capital of the fund accumulated during the twenty-one years. No other mode of dealing with the costs seems to me consistent * with justice under such a will in the cir- * 663 cumstances that have happened and at present exist.

THE LORD JUSTICE TURNER. — Having had an opportunity of considering this case since the Court rose yesterday, I do not think that any useful purpose would be served by deferring my judgment. The general rule is, that if there is in the first place an absolute gift and then a series of limitations modifying that gift, so far as the limitations do not extend, the absolute gift remains. If, on the other hand, there is no absolute gift, but only a series of limitations, then, so far as the limitations do not take effect, the property is undisposed of. The first question then here is, whether there is in the first instance an absolute gift. Now the shares of the sons are evidently given to them absolutely. The share of the daughter is, in the first instance, given in the same terms as that of the sons, and if there is any difference between the share of the daughter and the shares of the sons, it depends upon the directions that the sons' shares shall be paid to them as soon as conveniently may be, but that the daughter's share shall not be paid to her, but that a part of the testator's government securities equal to the value of her share shall be retained by the executors. It appears to me, that this is nothing more than a contrast as to the modes of dealing with the shares. The shares of the sons are to be paid to them, the share of the daughter is not to be paid to her,

but is to be set apart in a state of investment, and I think that this direction as to the daughter's share does not do away with the previous gift. Then follow directions as to the mode in which the daughter's share is to be dealt with; the income is to be accumulated during the life of her husband, and on his * 664 death the whole fund is to be disposed of in certain * ways, contingent upon whether she survives him and whether there are children. That disposition raises the present question. The husband having outlived the period allowed by law for the accumulation of income, to whom is the income to go? It appears to me, that there having been an absolute gift in the first instance, that gift takes in so much of the income as is not effectually disposed of by the subsequent limitations. The effect of the statute is, that so far as a trust for accumulation is invalidated by it the income goes to the persons who would have been entitled to it had there been no trust for accumulation. Who in the present case would have been so entitled? We may try this by supposing that no accumulation had been directed during the life of the husband. We have then trusts declared which arise only on the death of the husband with an absence of any declaration of trusts during his life, and in that case the original absolute gift remaining unmodified, so far as regarded the income arising during the husband's life, the whole of that income would have gone under the original gift. So here, the direction to accumulate being void after the twenty-one years, the income after that period goes according to that gift. I am of opinion, therefore, that the Master of the Rolls came to a right conclusion as to the income, and that the appeal on this point is unfounded.

I think, also, that the appeal is not well founded as to costs. An apportioned part of the costs cannot be thrown on the life-estate without valuing it, and I never met with any instance of the Court valuing a life-interest and ordering a share of the costs to be paid out of it, subject to the contingency of its continuing long enough to pay such share of costs. I think that the whole costs have been properly thrown on the accumulated fund, so that the parties interested will bear them in proportion to their interests.

* BLASSON *v.* BLASSON. * 665

1864. November 10, 21. Before the Lord Chancellor Lord WESTBURY.

A testatrix directed that a fund should be accumulated, and that when the youngest of the children of her nephew and nieces A., B., and C. who should have been born and living at the time of her decease should attain twenty-one the accumulated fund should be divided equally among all such children of A., B., and C. as should be then living, with a provision that if at the period of division any children should not personally claim their shares within twelve months, their shares should go over to the others. There were children born in the lifetime of the testatrix and others born after her death, two of whom at her death were in *ventre sa mère*.

***Held*, that the clause as to personal claim was not sufficient to restrict the preceding gift to children who attained twenty-one before the period of division, and that all children living at the period of division, whether born before or after the death of the testatrix, were entitled.**

***Held*, also, that a child in *ventre sa mère* is only to be treated as a born child where such construction is necessary for the benefit of that child, and that therefore the distribution was not postponed till the youngest child in *ventre sa mère* at the death of the testatrix attained twenty-one.[1]**

THIS was an appeal by some of the defendants from part of a decree of Vice-Chancellor KINDERSLEY, declaring the construction of a disposition in the will of Sarah Blasson.

The testatrix, by will, dated the 8th of August, 1843, gave certain property to trustees, including 5000*l.* 3*l.* per cent reduced bank annuities, upon trust to sell the property, other than the bank annuities, and invest the proceeds along with the bank annuities in their names in the books of the Bank of England and accumulate the income, — "and when and so soon as the youngest of the children of my last-named three nephews and nieces who shall have been born and living at the time of my decease, namely, the child or children of my nephew Thomas Blasson and of my nieces the present wives of Frederick Carritt and Frederick Froggitt, shall arrive at the age of twenty-one years, then the said stock, with the accumulations and increase, shall be equally divided among all such children of my nephew and of my nieces last named and described as shall be * then living, * 666 share and share alike; and if at the time of such division

[1] See 2 Jarman Wills (3d Eng. ed.), 171, 172; (4th Am. ed.) 75, note (2), 76.

any such child or children shall not personally make his or her legal claim to his or her portion thereof within eighteen calendar months after such division has been or ought to have been made, he, she, and they shall be considered as dead, and the trustees for the time being of this accumulated property shall be at full liberty, if they so see fit, to divide the share or shares of such absent person or persons between all the rest of such children then living and present, share and share alike, in addition to their original shares; and the whole principal and accumulation is for no other use, trust, or purpose whatsoever than is aforesaid written of and concerning the same."

The testatrix died on the 8th of January, 1844. The nephew and nieces all had children then living, and the youngest of those children attained twenty-one on the 20th of August, 1863.

On the 26th of August, 1863, there were living five children of Thomas Blasson, all born in the life of the testatrix; six children of Mrs. Carritt, four of whom were born in the lifetime of the testatrix, — one on the 11th of June, 1844, about five months after her death, and the other subsequently; and nine children of Mrs. Froggitt, two of whom were born in the lifetime of the testatrix, — one on the 2d of August, 1844, within seven months after the death of the testatrix, and the other six subsequently.

Vice-Chancellor KINDERSLEY held, that the period of division was the 2d of August, 1865, the time when the youngest of the children who were in *ventre sa mère* at the death of the testatrix would attain twenty-one, and that all the children then liv-
* 667 ing of the nephews * and nieces, whether born before or after the death of the testatrix, would be entitled to participate. Some of the children born in the lifetime of the testatrix appealed from this decision.

Mr. Glasse, *Mr. Grenside*, and *Mr. Cadman Jones*, for the appellants. — As to the period of division there is no case which supports the Vice-Chancellor's decision. In *Trower* v. *Butts*, (*a*) the words were "born in my lifetime." *Bennett* v. *Honeywood* (*b*) is against extending the rule of making posthumous children take. The other cases turn upon the expression "living." Here the testatrix has used the two words "born" and "living," treating them

(*a*) 1 Sim. & Stu. 181. (*b*) Ambl. 708.

as two distinct things; "born," therefore, must receive its natural meaning. *Whitelock* v. *Heddon* (*a*) is no authority on the meaning of the double expression, though it has sometimes been mentioned as being so; the limitation there being that if the testator's son should have any son or sons "begotten and born in lawful matrimony," then the property should go to such male issue as the son "should have" at the specified time, so the only decision was that a child in *ventre sa mère* comes within the description of issue whom the father "has" at that time.

As to the class to take, the construction which has been adopted is opposed to the scope of the will, and makes the disposition most whimsical. The testatrix makes a gift containing no provisions as to minority, and of such a nature that every person born in her lifetime who can claim under the gift must be adult. She assumes personal capacity to receive. Then comes the * clause * 668 as to personal demand, which could not be made by an infant; it is as if she had said that no minor was to take. Again, the testatrix, after describing a class with words restricting it to persons living at the time of her decease, mentions the same class again, introducing it by the word "namely," without expressing that it is a class to be ascertained at her decease, thus showing that she considered the words of restriction to run on, and it is a fair construction to hold that they run on into the immediately succeeding words of gift. "Last named and described" may be construed as applying to the great nephews and nieces. The Court will not construe an informally drawn will with strict technicality where so doing will evidently defeat the intention.

THE LORD CHANCELLOR. — If words have a plain distinct grammatical meaning according to the ordinary idiom of the English language, I cannot refuse to give them that meaning because the result is to produce a whimsical disposition. If the construing them according to their proper meaning produced a disposition in any way repugnant to other parts of the will, I might control their ordinary effect, but I cannot do so merely by reason of my supposing that the testatrix did not contemplate their having the effect which, if taken in their natural sense, they must have. I therefore do not think that the class of takers can be restricted to chil-

(*a*) 1 Bos. & P. 243.

dren living at the death of the testatrix. As to the period of division, I will hear counsel for the respondents.

Mr. Baily and *Mr. J. T. Humphry*, for the two children who were in *ventre sa mère* at the death of the testatrix. — We
* 669 do not oppose a division at the earlier period, * and we submit that it is the proper period. The Courts have considered a child in *ventre sa mère* as born for the purpose of enabling him to take, but not for the purpose of ascertaining a period. Here the children in *ventre sa mère* take whether they are considered as born at the death of the testatrix or not, and the reason for treating them as then born fails.

Mr. Toller and *Mr. Herbert Smith*, for children who were neither begotten nor born in the life of the testatrix, took the same view.

Mr. J. H. Palmer, for the trustees. — There is no prospect of any more children. The two nieces are dead, the wife of the nephew is living, and all his children by her have attained twenty-one.

Judgment reserved.

November 21.

THE LORD CHANCELLOR. — In *Trower* v. *Butts*, (*a*) a case determined by Sir JOHN LEACH in 1823, it was decided that a bequest of personalty in trust for all the children of the testatrix's nephew born in the lifetime of the testatrix, included a child of which the wife of the nephew was *enceinte* at the decease of the testatrix, although not born until several months after such decease. In the present case, some doubt was expressed by the Vice-Chancellor as to the correctness of that decision. But, in my opinion, the judgment of Sir JOHN LEACH was right, and well warranted by antece-
dent decisions in our law. The same rule prevails in other
* 670 systems of jurisprudence. In the Digest, lib. 1, * tit. 5, "De Statu Hominum," § 7, it is said, "Qui in utero est, perinde ac si in rebus humanis esset, custoditur, *quoties de commodis ipsius partûs quæritur*, quanquam alii, antequam nascatur, nequaquam

(*a*) 1 Sim. & Stu. 181.

prosit." And again, in sect. 26, it is said, "Qui in utero sunt in toto pæne jure civili intelliguntur in rerum naturâ esse." It is, however, material to observe that the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to, and that it is limited to cases where "de commodis ipsius partûs quæritur." This is well expressed by John Voët in his commentary of the title of the Digest, which I have cited. Speaking of the "Nascituri," his words are, "Fictione tamen juris pro jam natis habentur quoties de ipsorum commodo agitur." And again, "Quod si non ipsorum in utero existentium sed tertii tantum vertatur commodum, cessat illa juris fictio quâ pro jam natis haberentur, nec aliis prosunt nisi nati." This distinction supplies the ground for the decision of the present case. Reference is made by the testatrix to the time when the youngest of the children of her three nephews and nieces, who shall have been born and living at the time of her decease, shall arrive at the age of twenty-one years; and this reference is made for the purpose of putting an end on that event to a trust for accumulation, and the words, therefore, are descriptive only of a natural event, that is, the coming of age of the youngest of the children who were born and living at the death of the testatrix, in which description the word "born" must have its natural, and not its fictitious legal interpretation. It is indeed true, that in the present singular case the class of children to take under the gift might be augmented in number by holding that the words, "who shall have been born and living at the time of my decease," include children then
* *in utero;* but to hold this would not be warranted by the * 671
principle of this peculiar rule of construction, which is limited to cases where such construction of the word "born" is necessary for the benefit of the unborn child, and no such necessity here arises. Inasmuch, therefore, as the words in question are used for the purpose only of ascertaining a period of time, and are *not* a description of children as objects of a bequest or trust, I am of opinion that the words "born and living at the time of my decease" do not include children *in utero*, and that the trust for accumulation ceased when the youngest of the children actually born and living at the death of the testatrix attained majority. For these reasons I reverse this part of the judgment of the Vice-Chancellor. On the other point I agree with his Honor. The period of division

is the time when the youngest of the children actually born at the death of the testatrix attains majority, and the stock and accumulations are directed to be divided among all such children of her said nephew and nieces as shall be then living, that is, at the period of division; and as there is nothing to restrict or limit these words of description, all the children born after the death of the testatrix, but before the period of division, are entitled, if living at that period. The order of the Vice-Chancellor must be altered accordingly.

1865. July 25, 28. Before the Lord Chancellor Lord CRANWORTH.

A debtor resident abroad executed a power of attorney authorizing a person in this country to execute a deed of composition with his creditors. The execution of the power of attorney by the debtor and of the composition deed by the attorney was attested by solicitors.

Held, that the terms of the third rule of the 192d section of the Bankruptcy Act, 1861, had been sufficiently complied with, and that the deed ought to be registered.

THIS was an application for an order directing the registration of a deed of composition under the 192d section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), made by a debtor resident abroad, although it had not been executed by him in the presence of an attorney or solicitor.

The deed was made by the firm of Messrs. Bell, Ashburner, & Miller, of which Mr. Bell was a partner, and was dated the 26th June, 1865. The firm carried on business in Bombay and London, and Mr. Bell resided at Bombay. The other partners had executed the deed in England in the usual manner; but Mr. Bell had executed a power of attorney in the presence of a solicitor and notary-public at Bombay, empowering Mr. Weir Anderson "for him and in his name to convey and assign all his estate and effects on behalf of creditors, and to make any arrangements, and for that purpose to execute all deeds," &c.

Mr. Anderson accordingly executed the deed in London in the presence of a solicitor.

The deed having been presented for registration, the registrar

declined to receive it, on the ground that it was not executed by Mr. Bell himself.

The 3d rule of the 192d section of the Bankruptcy Act, 1861, provides, that "the execution of such deed * or * 673 instrument by the debtor shall be attested by an attorney or solicitor."

Mr. Bacon and *Mr. Reed*, in support of the application.

The Lord Chancellor took time to consider the question.

July 28.

The Lord Chancellor said, that where the debtor was out of the jurisdiction, it was sufficient if both the power of attorney and the trust-deed were attested by a solicitor. That had been done in the present case, and he was therefore of opinion that the deed ought to be registered.

AN INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ACCOUNT.

1. A trading firm agreed to give to an agent a commission on orders obtained by himself, and a commission at a different rate on orders not obtained by him, but given by persons first introduced by him. *Held*, that the fact that the agent must in general be ignorant of the latter class of orders did not entitle him to file a bill against his principals for an account of what was due to him for commission, but that his remedy was at law. — *Smith* v. *Leveaux*, 1.

2. The plaintiffs, in 1855, engaged the defendant as their traveller, to obtain orders and collect moneys, at a salary, the plaintiffs paying all travelling expenses. After each journey the defendant rendered an account and paid over the balance appearing to be due from him. The travelling expenses were charged in the accounts as so many days' travelling expenses, without giving any particulars. No objection was made to the accounts, and they were entered in the plaintiffs' books. This went on till April, 1861, when the defendant gave the plaintiffs six months' notice of his intention to leave their service. The plaintiffs, in July, 1861, gave him notice to keep a detailed account of his travelling expenses, but, notwithstanding this, his subsequent accounts were prepared on the same footing as the former ones, and were dealt with in the same way down to October, 1861, when he left the plaintiffs' service. The defendant having sent in a claim for salary, the plaintiffs served him with a counter claim, which however did not raise any questions as to his accounts. *Held*, * that a bill by the plaintiffs against the defendant for an account could not be maintained. * 676

Per the Lord Justice TURNER: Where accounts have been rendered, the balances appearing due upon them paid, and the accounts entered in the books of the persons to whom they have been delivered, and a subsequent account has been rendered by those persons, raising no question as to the accounts which have been delivered, those accounts must be treated as settled.

Per the Lord Justice TURNER: From the course of dealing between the

parties, an agreement that the travelling expenses should be charged in a gross sum without giving particulars, was to be implied, which agreement the plaintiffs could not determine by their notice of July, 1861. — *Hunter* v. *Belcher*, 194.

3. H. & Co. were in the receipt of the rents of leasehold property as agents of P. In 1834 P. died intestate. In 1838 H. & Co. rendered to his daughter an account, to which some objections were taken by her, which were answered, and no replies made to the answers. In 1845 the daughter took out administration to P., and in 1852 filed a bill against H. & Co. for an account: *Held*, that the account must be treated as a settled account, and that the bill could not be sustained. — *Parkinson* v. *Hanbury*, 450.

See ANNULLING BANKRUPTCY. PARTIES.

ACQUIESCENCE. See INJUNCTION, 1.

ACT OF BANKRUPTCY. See BANKRUPTCY, 1.

ADVANCEMENT. See RESULTING TRUST.

AGENT. See ACCOUNT, 1. VENDOR AND PURCHASER, 1.

AGREEMENT. See CONSIDERATION.

AGREEMENT FOR MORTGAGE. See POWER OF SALE, 2.

ALLOTMENT. See SHAREHOLDER.

ALTERATION OF INSTRUMENT AFTER SIGNATURE.

F. signed the memorandum and articles of association of a company. After signature, but before registration, a sheet of the articles was taken out and a new sheet substituted for it without his privity, but with the approbation of the persons then managing the company. There was a conflict of evidence as to whether the contents of the substituted sheet were identical with those of the old one, and whether there was not a material alteration: *Held*, that the articles were not binding upon F., that the articles and memorandum must be taken as together constituting one instrument, and that F. was not a contributory.

* 677 * *Per* the Lord Justice TURNER: If the substitution of a sheet in a deed after execution does not *ipso facto*, without reference to the question whether there is any variation in the contents, make the deed void, as to which *quære*, at all events it makes the deed void unless it be most clearly proved that the contents of the old and the substituted sheet are identical, or at least that there is no material difference between them. — *In re The United Kingdom Ship Owning Company, Limited. Felgate's Case*, 456.

ALTERNATIVE CASE. See PLEADING, 1.

ANNUITY. See CONSIDERATION.

ANNUITY ACT.

F. C. granted to D. an annuity of 139*l.* for five years determinable upon lives, and after the expiration of the five years an annuity of 199*l.* determinable on the same lives. T. C., as surety, by the same deed, secured the annuity on freehold land of his own, covenanting that it was free from incumbrances. The land was, in fact, subject to a mortgage to M. and others; its rental, apart from the incumbrance, was above

199*l*. but, deducting the interest of the mortgage, was between 199*l*. and 139*l*., M., who was a solicitor, acted for all parties in the preparation of the annuity deed, but D. had no actual notice of the incumbrance.

Held, by the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls, the Lord Justice TURNER doubting, that the annuity deed did not require enrolment, for that T. C. was a grantor within the meaning of the Act 53 Geo. 3, c. 141, § 10, and that although the annuity must be taken to be of the larger amount, D. had not, within the meaning of the Act "notice" of the mortgage, so that the yearly value of the land was sufficient. — *Thompson* v. *Cartwright*, 10.

ANNULLING BANKRUPTCY.

A purchase was made from the assignees of a bankrupt, in which their solicitor was interested, so as to invalidate the transaction. Afterwards the bankruptcy was by arrangement annulled, without prejudice to any sale or other act done by the assignees, and the bankrupt by deed, to which he and the assignees alone were parties, ratified their acts, relieved them from all claims in respect of them, and agreed to execute all further deeds necessary for confirming them. After this the bankrupt filed a bill against the purchasers to impeach the sale to them. The defendants alleged that the plaintiff had obtained the annulling order by fraudulent suppression.

Held, that by virtue of the annulling order the plaintiff had the * right * 678 to impeach all sales on any grounds on which they might have been impeached if the bankruptcy had not been annulled, and that the deed executed by him did not affect this right.

Held, also, that the annulling order being in force, this Court must treat it as valid, and could not enter into the question whether it was obtained by fraud.

Held, therefore, that the sale must be set aside, but without prejudice to the question whether the creditors, or the late assignees on their behalf, were not entitled to claim the benefit arising from setting it aside.

Held, also, that the purchaser must account, as a mortgagee in possession, for rents received, or which but for his wilful default he might have received, though no case of wilful default was made by the bill. — *Adams* v. *Sworder*, 44.

ANSWER. See PRACTICE, 2.

ANTICIPATION (RESTRAINT ON). See SEPARATE USE.

APPEAL. See DISCRETION.

APPEAL AS TO COSTS. See COSTS, 1.

APPLICATION FOR SHARES. See SHAREHOLDER.

APPOINTMENT ON BARGAIN. See POWER.

ARBITRATION. See AWARD.

ASSIGNMENT OF WIFE'S CHOSE IN ACTION. See HUSBAND AND WIFE, 2.

ASSURANCE. See POLICY OF ASSURANCE. RENEWAL OF LEASEHOLDS.

ATTORNEY (POWER OF). See POWER OF ATTORNEY.

AWARD.

Under a submission to arbitration containing no provision for making it a rule of Court, an award was made in June, 1859, finding a sum due from S. to W. In December, 1859, W. brought an action on the award, to which S. pleaded *nul tiel agard*, and adduced in support of the plea evidence that the arbitrators had made their award according to the opinion of a third party, and not their own. A verdict was found for S., the defendant at law, leave being reserved to W. to move to have it entered for him. In June, 1860, the Court of Exchequer discharged a rule *nisi* which had been obtained for that purpose, but in December, 1861, the Court of Exchequer Chamber reversed this decision on the ground that the above defence was not available by way of plea.

*679 In March, 1862, S. filed his bill to *set aside the award and to be relieved against the judgment. Vice-Chancellor WOOD held, that as the submission did not contain any agreement that it might be made a rule of Court, and as it never had been made a rule of Court the Court had jurisdiction; that if the matter had been fresh the award must have been set aside, and the Court had still jurisdiction to do so, but that as the plaintiff might have made the submission a rule of Court and set aside the award at law on the grounds now urged, but had allowed the time for so doing to elapse, this Court ought not to interfere, unless in a strong case: and his Honor being disposed to the view that the arbitrators had, however irregularly, come to a correct conclusion, dismissed the bill.

Held, by the Lord Justice KNIGHT BRUCE, that the plaintiff must by his course of conduct be taken to have elected to defend himself against the award by defending the action and to abandon all other modes of opposition; that he must therefore abide by the result of the action, and that the bill had been properly dismissed.

Held, by the Lord Justice TURNER, that where a submission to arbitration has not been made a rule of Court and contains no agreement that it may be made a rule of Court, the jurisdiction of equity to set aside the award is unaffected by the statutes; that the plaintiff's conduct in the present case had not been such as to debar him of his right to resort to a Court of Equity; that the Court had no jurisdiction to inquire whether the award was right or wrong, and that the plaintiff ought to have had relief on the ground of the invalidity of the award. — *Smith* v. *Whitmore*, 297.

BANKRUPTCY.

1. A tradesman mortgaged the freehold house in which he carried on his trade, being his only real estate, to secure an existing debt of 1100*l*. for which he was liable as surety, which exceeded the value of the mortgaged property. His other property was of very trifling amount. He was at the time liable as surety on a promissory note for 2000*l*., and afterwards the other makers having become insolvent, he was called

upon for payment, and became bankrupt: *Held*, that the mortgage was void as against the assignees in bankruptcy, as being an assignment made to defeat or delay creditors.

Per the Lord Justice TURNER. A surety is no more justified in placing the whole of his property out of the reach of liability to pay the debt, than if he were the principal debtor. — *Goodricke* v. *Taylor*, 135.

2. There can be no proof, under a deed of trust under the 192d section of the Bankruptcy Act, 1861, for damages on a contract, * unless * 680 the contract was broken before the execution of the deed.

H. & Co. purchased a cargo, the buyers to name the port of delivery. On the arrival of the ship they declined to name the port of delivery, and signified their inability to perform the contract. The sellers therefore named the port and sold the cargo at a loss; but before this was done H. & Co. executed a deed of trust under the 192d section: *Held*, that the contract was still subsisting at the date of the deed, and that the sellers could not prove for the loss. — *Ex parte Halliday*. *In re Hall and Jones*, 312.

See ANNULLING BANKRUPTCY.

BILL. See PLEADING, 1.

BILL IN AID OF ACTION AT LAW. See PLEADING, 2.

"BORN AND LIVING." See CHILDREN.

BREACH OF TRUST. See PARTIES.

CERTIFICATE. See SCIENTIFIC PERSON.

CERTIFICATES. See WINDING UP, 3.

CHARITY. See CORPORATION.

CHILDREN.

A testatrix directed that a fund should be accumulated, and that when the youngest of the children of her nephew and nieces, A., B., and C. who should have been born and living at the time of her decease should attain twenty-one the accumulated fund should be divided equally among all such children of A., B., and C., as should be then living, with a provision that if at the period of division any children should not personally claim their shares within twelve months, their shares should go over to the others. There were children born in the life-time of the testatrix and others born after her death, two of whom at her death were in *ventre sa mère*.

Held, that the clause as to personal claim was not sufficient to restrict the preceding gift to children who attained twenty-one before the period of division, and that all children living at the period of division, whether born before or after the death of the testatrix, were entitled.

Held, also, that a child in *ventre sa mère* is only to be treated as a born child where such construction is necessary for the benefit of that child, and that therefore the distribution was not postponed till the youngest child in *ventre sa mère* at the death of the testatrix attained twenty-one. — *Blasson* v. *Blasson*, 665.

*681 *CHOSE IN ACTION. See HUSBAND AND WIFE, 2. VOLUNTARY ASSIGNMENT.
CIVIL DEATH. See NUN.
CLASS. See CHILDREN.
COMPANY.
1. An arrangement was made between company A. and company P., both registered under 7 & 8 Vict. c. 110, that the assets of company A. should be made over to company P.; that the shareholders of the former should become shareholders in the latter and execute its deed of settlement, and that company P. should indemnify them against all their liabilities as shareholders in company A. After a decree, by which it was settled that those shareholders in company A. who had declined to become shareholders in company P. were not entitled to indemnity under this covenant, one of them bought up the benefit of a decree obtained by a creditor against company A., and a writ of *fi. fa.* having been issued against that company, to which a return of *nulla bona* was made, he applied for leave to issue execution against one of the shareholders in company A., who had become a shareholder in company P. *Held*, that this was a fraudulent use of the debt, and that the rule that a partner cannot buy in a debt of the firm and enforce it against his copartners applies equally as between shareholders in joint-stock companies.
Semble, that as the shareholder who executed the deed of company P. had never made any transfer of his shares in company A., and that company had never been wound up or dissolved, he did not, by executing the deed of company P., cease to be a shareholder in company A. so as to escape from liability for its debts. — *Woodhams* v. *The Anglo-Australian and Universal Family Life Assurance Company*, 162.
2. The prospectus of a proposed company described as a "finance bank" stated eight objects, some of which went beyond ordinary banking business. In May, S., on the footing of this prospectus, applied for 50 shares, and paid the deposit. On the 1st of June the company was registered with a memorandum of association defining its objects, which went considerably further beyond the ordinary business of banking than the objects mentioned in the prospectus, and on the same day the directors sent S. a letter of allotment of 50 shares. In December of the same year the company failed. S. applied to have his name taken off the register, on the ground that he never had agreed to become a shareholder in a company with these extended objects. There being no evidence to rebut S.'s positive oath, that until the company had
*682 failed he never had * any notice of the extension of the objects of the company beyond those named in the prospectus: *Held*, affirming the decision of Vice-Chancellor WOOD, that his name ought to be removed from the register. — *In re The Scottish and Universal Finance Bank, Limited. Ship's Case*, 544.
See CONTRIBUTORY, 1, 2. SHAREHOLDER. WINDING UP, 1, 2.
COMPOSITION DEED. See POWER OF ATTORNEY.

COMPROMISE BY COURT. See INFANT, 2.
CONCEALMENT. See FAMILY ARRANGEMENT.
CONCURRENT SUITS. See INFANT, 1.
CONDUCT OF PROCEEDINGS. See INFANT, 1.
CONFIRMATION. See CONSTRUCTION, 2.
CONSENT. See POWER OF SALE, 1.
CONSIDERATION.

Communications took place between a bachelor and his kept mistress as to a discontinuance of the cohabitation, and in the course of these communications the woman uniformly asserted that he had promised to marry her, which assertions there appeared to be a fair prospect of her being able to substantiate. Ultimately the man proposed by letter that they should separate, he allowing her an annuity, which offer she accepted. *Held*, that this was a contract for valuable consideration, which could be enforced against the man. — *Keenan* v. *Handley*, 283.

CONSOLIDATED ORDERS, VII. 2. See PARTIES.
CONSTRUCTION.

1. By a marriage settlement a fund was limited in trust after the death of the parents to transfer, &c., to all the children equally; the shares of minors to be paid, transferred, &c. at their age of twenty-one years, with maintenance in the mean time: and there was a gift over if there should be no child, or "if they should all happen to die before they became entitled to their respective shares:" *Held*, that the shares of the children vested at their birth, and that the shares of two of them, who died in their infancy in the lifetime of their parents, passed to their personal representatives.

A petition of appeal by some of several co-plaintiffs against the others of them was allowed. — *Jopp* v. *Wood*. *Smith* v. *Jopp*, 323.

2. The Corporation of London in 1862, obtained an Act authorizing them to make a new street and buy land for that purpose, with certain powers of reselling land not required for the street. About * the * 683 same time a railway company obtained an Act authorizing the company and the corporation to enter into agreements for the sale of land by the corporation to the company. Shortly before either Act had passed the corporation entered into an agreement with the company to take under the powers of their Act and sell to the company certain lands including land of the plaintiff. The plaintiff filed his bill to restrain the corporation from taking his land on the ground of this agreement and obtained an injunction. After this another Act was passed authorizing the corporation to take lands for another undertaking; and by this Act, after reciting that certain lands might be taken under it which were liable to be taken by the corporation under their former Act, and with respect to which an agreement was "under the authority" of that Act and the railway Act entered into between the corporation and the company, and that it was expedient "that the rights of the company under such agreement should be preserved," it was enacted that nothing in the present Act should prejudice "the

rights of that company under the said agreement," but that all the provisions of the agreement should be as applicable to the lands if purchased under the powers of the present Act as they would have been if they had been purchased under the former Act. The plaintiff's land was liable to be taken under this latter Act.

Held, by the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls, the Lord Justice TURNER dissenting, that the legislature had by the latter Act recognized the validity of the agreement, and that the agreement was therefore no obstacle to the corporation taking the land of the plaintiff under the latter Act. — *Galloway* v. *Corporation of London*, 639.

3. A testator bequeathed his residuary estate to his two sons and daughter in equal shares. He then directed the shares of his sons to be paid to them as soon as convenient, and directed that his daughter's share should not be paid to her, but that the income should be accumulated during the life of her husband, and upon the death of her husband, should there be any child or children living, the property should be secured for their benefit and that of their mother, but should there be no child or children living, then the share might be paid to her for her own use and benefit, but if she died before her share became payable, then he directed it to be held in trust for his two sons. The husband was still living at the expiration of twenty-one years from the death of the testator: *Held*, that upon the accumulations being put an end to by the Thellusson Act, the income became payable to the wife during
* 684 the joint lives * of herself and her husband, the original gift to her remaining in force so far as the trusts by which it was modified were incapable of taking effect. — *Combe* v. *Hughes*, 657.

See CHILDREN. WILL, 1, 2, 3.

CONSTRUCTIVE NOTICE. See NOTICE.

CONTRIBUTORY.

1. S., the local manager of a company, was asked by the general manager to become a director, the qualification for which was the holding 500 shares. 500 shares held by the manager as a trustee for the company were transferred to S. by deed, which S. also executed. He acted as director, but he was not registered as a shareholder, never received any notice of dividends, continued to be local manager, and never paid the price which was expressed in the deed of transfer to be paid for the shares, nor appeared to have been treated as a shareholder, and the Court was satisfied on the evidence that he had never agreed to purchase the shares, but that they were transferred to him by order of the directors merely to qualify him for the directorship: *Held*, that if the company, which could not be bound by the transaction, elected to affirm it, S. was only a trustee for the company, and so not a contributory; and that if they elected to disaffirm it, then, it not appearing that S. was privy to the breach of duty on the part of the directors, it must be rescinded altogether, and that S. therefore was not a contributory. — *In re Waterloo Life, &c., Assurance Company. Saunders's Case*, 101.

2. If a person is induced to take shares on the faith of a promise by the promoters of a company, which promise is not kept, he is, nevertheless, a contributory, his remedy being only against the persons who made the promise. — *In re United Kingdom Ship Owning Company. Felgate's Case*, 456.

See COMPANY, 2.

CONVERSION.

1. A fund was vested in trustees upon trust during the joint lives of husband and wife, to pay out of the income to the wife 200*l*. a year, and if she survived her husband, then during the rest of her life 500*l*. a year, and subject thereto upon trust for the husband. And the husband covenanted that if the income should become less than 500*l*. a year, he would add to the fund, so as to make up the income to that amount. The income during the husband's life was reduced below 500*l*. The husband by will devised his real estate to his wife for life, and directed his personal estate to be converted and invested in land to be settled to the same uses: *Held*, that the widow was entitled to have the annuity fund made up to 500*l*. a year, and * then to have the husband's reversionary interest in it sold, and the proceeds invested according to the will. — *Countess of Harrington* v. *Sir William Atherton*, 352. * 685

2. Real estate was settled by a marriage settlement, not comprising any personal estate. The tenant for life sold part of the land to a company under the powers of their Act, and the proceeds were paid into Court and invested. Afterwards the tenant for life, under a power in the settlement, appointed by will to his son the whole settled estate and the purchase-money of the part which had been sold. The son by will disposed of his residuary personal estate of which he might be possessed or over which he might have any power of disposition at his decease, including in such personal estate "all moneys to which I may be entitled under the marriage settlement of my father and mother;" and he declared that he did not by his will intend to dispose of any real estate, but only of personal estate and chattels real. The widow of the tenant for life, who was entitled to a jointure, was still living: *Held*, by the Lord Justice TURNER, affirming the decision of Vice-Chancellor KINDERSLEY, the Lord Justice KNIGHT BRUCE doubting, that the fund arising from the sale did not pass by the will. — *In re Skeggs's Settlement*, 533.

CORPORATION.

The jurisdiction of the Court of Chancery over the property of corporations affected with a trust applies to purely ecclesiastical as well as to lay corporations.

Where by the charter of foundation of a charity the property of the charity was directed to be applied for the benefit of the poor, the Court enforced the trust, although for several centuries certain fixed payments only had been made to the poor and the surplus rents had been enjoyed by the master.

But where a municipal corporation had for more than three centuries exercised the right of presentation to the mastership of a charity for their own benefit, without acknowledgment of any trust, the Court refused to declare that the right of presentation was affected with a trust for the charity. — *The Attorney-General* v. *St. John's Hospital, Bedford*, 621.

COSTS.

1. The general rule of the Court is, that there cannot be a rehearing for costs alone, unless some principle is involved in the mode of dealing with them, and it is only in extreme cases that the Court will rehear the merits on the question of costs. — *Chappell* v. *Gregory*, 111.
2. A bankrupt was refused his certificate on the ground of fraudulent concealment of property. Subsequently a consent order for annulling the bankruptcy was obtained, in consideration of a friend of the bank-
* 686 rupt's paying a sum to * the creditors. After this the assignees discovered that other property to a large extent had been concealed by the bankrupt, and they presented a petition to discharge the annulling order, as having been obtained by fraud, and before this petition had been heard filed a bill to restrain the bankrupt from getting in the concealed property. The petition was ultimately dismissed by the Lord Chancellor, on the ground that the assignees having, when they consented to the annulling order, been aware of previous fraudulent concealment, could not be held to have consented to the order on the faith of the bankrupt's having made a full disclosure of his property. *Held*, that the proceedings in the cause ought to be stayed, without costs. — *Elsey* v. *Adams*, 147.
3. Where by consent of a mortgagee property is sold by the Court free from the mortgage security: *Semble*, that the costs of other parties of the sale ought not to be paid out of the proceeds of sale in priority to the mortgage debt; but whether they ought not to be so paid where the estate is so sold in an administration suit in which the mortgagee has proved for the whole mortgage debt, *quære*. — *In re Mackinlay. Ward* v. *Mackinlay*, 358.

See LUNACY, 1, 2.

COSTS OF SUIT FOR SEPARATION. See HUSBAND AND WIFE, 1.

COSTS (OF SUIT IN ANOTHER BRANCH OF THE COURT). See TRUSTEE (COSTS OF), 1, 2.

COSTS OF TRUSTEE. See TRUSTEE (COSTS OF), 1, 2.

COVENANT. See SHOP (COVENANT NOT TO CONVERT PREMISES INTO).

COVENANT NOT TO BUILD. See INJUNCTION, 2.

DAMAGES. See INJUNCTION, 1. SPECIFIC PERFORMANCE.

DAMAGES (PROOF FOR IN BANKRUPTCY). See BANKRUPTCY, 2.

DEAN (FOREST OF). See FOREST OF DEAN.

DEATH IN TESTATOR'S LIFE. See WILL, 1.

DEBT (FRAUDULENT USE OF). See COMPANY, 1.

DEBTS OF LUNATIC. See LUNACY, 4.

DEBTS (PROOF OF). See BANKRUPTCY, 2.
DEED. See ALTERATION OF INSTRUMENT AFTER SIGNATURE. PARCELS.
DEFENCE AT LAW. See PLEADING, 2.
*DELAY. See INJUNCTION, 1. *687
DEMURRER. See PLEADING. 1.
DEPOSIT. See VENDOR AND PURCHASER, 2.
"DESCENDANTS." See WILL, 3.
DESCRIPTION. See PARCELS.
DISCRETION.
The Court of appeal will not, except in an extreme case, disturb the selection of a receiver by a Judge, unless there be some objection in point of principle to the person appointed. How objections in point of principle are to be treated where the order gives the person objected to liberty to propose himself as receiver. — *Cookes* v. *Cookes*, 526.
DISMISSAL OF BILL ON PLAINTIFF'S APPLICATION. See COSTS, 2.
DOUBLE PORTIONS. See PORTIONS.
DURESS. See NUN.

ELECTION. See CONVERSION, 2.
ENROLMENT. See PRACTICE, 1.
"ENTITLED," WHETHER IN INTEREST OR POSSESSION. See CONSTRUCTION, 1.
EQUITABLE PLEA. See PLEADING, 2.
EQUITABLE WASTE. See WASTE.
EXECUTOR.
An executor, who was also a legatee, borrowed 500*l.* and gave the lender a memorandum reciting that the money was borrowed for the purposes of the will, and agreeing to charge the trust estate, "so far as he could and lawfully might," and his legacy, and a policy, which was part of the assets, with the repayment, and to execute a mortgage. Afterwards the executor borrowed from the same person 400*l.*, and by a deed reciting the will and stating certain sums to be due from the estate to the executor, and that the executor owed the lender 900*l.*, the executor assigned to the lender all the sums mentioned to be due from the estate to the executor by way of security for the 900*l.* with interest: *Held*, that the lender had by this deed given up such claim if any, against the testator's estate, as he had under the memorandum and could only establish a security upon the executor's beneficial interest. — *In re Brettle. Brettle* v. *Burdett*, 244.
EXPECTANT HEIR.
The repeal of the usury laws has not altered the rules of the Court as to dealings with expectant heirs, and, accordingly, where an extravagant young man, entitled in reversion to an estate, and very much pressed
*for money, had shortly after attaining twenty-one given to a *688
money lender securities bearing an exorbitant rate of interest,
they were ordered to stand as a security only for the sums actually

advanced and interest thereon at 5*l.* per cent per annum. — *Croft* v. *Graham*, 155.

EXPERT. See SCIENTIFIC PERSON.

FAMILY ARRANGEMENT.

In order that a transaction not otherwise valid may be supported upon the ground of its being a family arrangement, there must be a full and fair communication of all material circumstances affecting the subject-matter of the agreement which are within the knowledge of the several parties, whether such information be asked for by the other parties or not. — *Greenwood* v. *Greenwood*, 28.

FIERI FACIAS. See JUDGMENT.

FOREST OF DEAN.

The upper veins of coal of a tract in the Forest of Dean were "galed" by the Crown under the Forest of Dean Mining Act (1 & 2 Vict. c. 43) to the plaintiffs, with a reservation that the underlying veins might be galed to other parties, "but to be worked so as not to impede or injure the working of tracts already allotted." The veins underlying the plaintiffs' colliery were afterwards galed to the defendants, who sunk a shaft through the plaintiffs' works: *Held*, that the restriction applied only to the working of the lower seams when reached, and did not abridge the right of the defendants to sink a shaft through the upper veins.

Whether the commissioners had power under the 1 & 2 Vict. c. 43, to impose on existing galees any rules and conditions which would diminish the rights which they enjoyed before the Act, *quære*. — *Goold* v. *The Great Western Deep Coal Company*, 600.

FRAME OF BILL. See PLEADING, 1.

FRAUD.

1. A bill was filed by an heir-at-law to have a will of real estate cancelled, on the ground that it had been obtained by the direct fraud of persons taking a beneficial interest under it, of whom the principal defendant was one: *Held* by the Lord Justice TURNER (the Lord Justice KNIGHT BRUCE doubting), that notwithstanding the Statutes 21 & 22 Vict. c. 27 (Sir HUGH M. CAIRNS's Act), and 25 & 26 Vict. c. 42 (Mr. Rolt's Act) the bill was demurrable, the plaintiff's remedy being only at law. — *Jones* v. *Gregory*, 83.

2. In 1862, an Act was passed authorizing the corporation of London to make a new street and buy certain lands (including the land of
* 689 * the plaintiff) and sell such parts of them as were not required to form part of the street. Shortly before the passing of this Act, the corporation agreed with a railway company, which had no power to take the plaintiff's land, that if the Act passed the company would purchase certain lands under the Act and sell for a certain price a specified part of them to the company, such part including the bulk of the plaintiff's land, only a small portion of which was required to be

thrown into the new street. The corporation, after the passing of the Act, gave the plaintiff notice to take the whole of his land. *Held*, by the Lord Justice KNIGHT BRUCE, the Lord Justice TURNER inclining to the same opinion, that the corporation had, by entering into the above agreement, incapacitated themselves from forming a just judgment, as between them and the plaintiff, concerning the quantity of his land which they should require and that an injunction ought to be granted to restrain them from proceeding on their notice.

Per the Lord Justice TURNER: Whether an injunction ought not to be granted on the ground that the corporation were buying in order to sell to a body which had no capacity to take, *quære?* — *Galloway* v. *The Mayor, Aldermen, and Commons of the City of London*, 213.

See COMPANY, 1. CONTRIBUTORY, 2. NOTICE.

FRAUDULENT APPOINTMENT. See POWER.

FRAUDULENT CONVEYANCE. See BANKRUPTCY, 1.

FRAUDULENT PURCHASE. See ANNULLING BANKRUPTCY.

GIFT OVER. See CONSTRUCTION, 1.

GOOD-WILL. See PARTNERSHIP.

HEIR. See EXPECTANT HEIR.

HUSBAND AND WIFE.

1. A solicitor, who had been employed by a married woman to conduct a suit for judicial separation, which suit ended in a compromise, claimed to prove as a creditor against the estate of the husband for his costs, as necessaries supplied to the wife. The Court being of opinion that there was no reasonable ground for the suit, and that the solicitor, though he believed that there was, might by making proper inquiries have ascertained that there was not: *Held*, that in these circumstances the claim could not be sustained.

Per the Lord Justice TURNER. * Whether even if the solicitor had * 690 after making proper inquiries had reasonable cause for his belief that there were good grounds for instituting the suit, he could have maintained his claim, when it ultimately turned out that the wife had not any such case as would entitle her to a separation, *quære?* — *In re Hooper*. *Baylis* v. *Watkins*, 91.

2. A married woman, entitled to income for her separate use, agreed to assist her husband in obtaining a loan from an insurance company. A policy was accordingly effected with the company, by which a sum was assured to the survivor of the husband and wife upon the death of the one first dying. By a mortgage-deed of the same date, reciting an agreement for a loan by the office at the request of husband and wife, the wife assigned her separate income, and the husband the policy, by way of mortgage for securing the sum advanced by the company. By the same deed the husband and wife, the wife joining for the purpose

of binding her separate estate, covenanted that the husband would pay the premiums on the policy, and there was a declaration by the husband alone that if he did not pay them the mortgagees might pay them out of the income, and a declaration by all parties that if the policy moneys became payable before the mortgage debt was paid the company might pay it out of those moneys. After the death of the husband the wife claimed the moneys payable under the policy as being a *chose in action* not settled to her separate use, and therefore incapable of being effectually assigned during the husband's life. *Held*, that although the policy if taken alone created an interest in the wife not capable of being assigned so as to bar her right by survivorship, yet as it had been created for the purpose of the mortgage, and as a part of the same transaction, and in pursuance of a contract that it should be a security to the company, the wife's interest was included in the security. — *Winter* v. *Easum*, 272.

See SEPARATE USE.

INCONSISTENCY. See PLEADING, 1.

INFANT.

1. A suit was instituted on the 16th of October on behalf of infants by their great-uncle, as their next friend, for the administration of the estates of their father and mother. On the 18th of November a second suit was instituted on behalf of the same infants by a stranger as their next friend, and a decree was obtained on the 21st, the solicitors for the plaintiffs in the second suit being the London agents of the solicitors of the defendant: *Held*, that in these circumstances the institution of the second suit was improper, and that the conduct of it ought to be given to the next friend in the first suit. — *Frost* v. *Ward*, 70.

*691 *2. A compromise grounded on the supposed insufficiency of a real estate to pay an infant's legacy, and other legacies charged upon it, was sanctioned by the Court on behalf of the infant. It appeared that at the time of the inquiry as to the compromise being for the benefit of the infant, a document relative to the valuation of the estate — of a character rendering it doubtful whether the valuation, which throughout the inquiry was treated as correct, was not based on erroneous principles, so as to give an undervalue — was in the possession of the owners of the estate, but was not laid before the Master: *Held*, that the compromise must be set aside, for that it was the duty of the owners of the estate to bring the case fairly before the Master, and supply all material information which was in their possession, and that the case was not altered by his being satisfied with the materials before him, and not asking for further information.

Per the Lord Justice TURNER: A compromise sanctioned by the Court on the part of an infant cannot be set aside by him on any ground which would be insufficient to set aside a compromise between persons *sui juris*. Whether it can always be set aside on grounds which as between

parties *sui juris* would be sufficient, *quære*. In neither case can a compromise be set aside, unless there has been on the part of the person claiming the benefit of it conduct which in the view of a Court of Equity amounts to fraud. — *Brooke* v. *Lord Mostyn*, 373.

INJUNCTION.

1. The defendant on the 28th of March called on the plaintiff, who occupied a house adjoining his, and informed her that he was going to erect a photographic studio on a building at the rear of his premises, and that plans had been prepared. The plaintiff under a misunderstanding as to the spot where the studio was to be erected made no objection, and did not ask to see the plans. On the 8th of April, the workmen commenced operations. The actual erection of the studio began on the 16th, and the first complaint was made verbally on the 24th, by which day considerable progress had been made in the building. On the 28th a formal written complaint was made, and on the 5th of May the plaintiff filed her bill for an injunction and damages, alleging obstruction of air and light. The bill was dismissed with costs by the Vice-Chancellor on the gound of delay and acquiescence.

Held, that although there had been sufficient acquiescence to justify the Court in refusing an injunction on interlocutory application, there had not been such acquiescence as to justify the dismissal of the bill on that ground.

The case for an injunction failing, whether under 25 & 26 Vict. * c. 42 * 692 (Mr. Rolt's Act), it was obligatory on the Court to decide upon the question of damages, *quære*.

Held, however, that the case was one in which the Court ought to exercise the jurisdiction given to it by the Stat. 21 & 22 Vict. c. 27 (Sir H. M. Cairns's Act), and determine whether the plaintiff was entitled to any and what damages. — *Johnson* v. *Wyatt*, 18.

2. A railway company bought land from the plaintiff, and in the purchase-deed covenanted with him not to erect any building upon it to a greater height than eighteen feet within the distance of eighty feet from certain other property of his. At the time of the conveyance the railway had been carried through the purchased land with two lines of rails on a viaduct thirty-three feet high, part of which was within eighty feet from the protected property. The company afterwards determined to widen their railway, so as to have four lines of rails, and commenced building on the purchased land, for the purpose of widening the viaduct, piers more than eighteen feet high, and standing within eighty feet of the protected property and between it and the old viaduct: *Held*, by the Lord Justice Turner, affirming the decision of Vice-Chancellor Kindersley, the Lord Justice Knight Bruce dissenting, that they ought to be restrained from so doing. — *Lloyd* v. *The London, Chatham, and Dover Railway Company*, 568.

INTENTION. See MISTAKE.

INTEREST. See Separate Use.

JUDGMENT.

A defendant appealed from a decree ordering him to pay the plaintiff's costs. The appeal was dismissed without costs, and the deposit ordered to be returned. The plaintiff, who had issued a *fi. fa.* for the costs of suit, applied for an order staying the repayment of the deposit to the defendant, but the application was refused. — *Martyr* v. *Lawrence*, 347.

JURISDICTION. See FRAUD, 1. WINDING UP, 2.

LANDS CLAUSES ACT.

Where a piece of land had been taken by a railway company, and the purchase-money paid into Court under the Lands Clauses Act, the Court allowed the money to be laid out in building cottages on another part of the estate which was lying waste and unproductive; but in such a case no part of the money will be paid out till the buildings are completed. — *In re Drummer's Will*, 515.

*693 *LANDS CLAUSES ACT, SECT. 80. See LUNACY, 2.

LEASE. See SPECIFIC PERFORMANCE.

LIFE ASSURANCE. See POLICY OF ASSURANCE.

LIQUIDATORS. See WINDING UP, 2.

LUNACY.

1. A gentleman was placed under restraint by his relations as being incapable of managing his affairs. He had previously had temporary fits of mental aberration, from which he had recovered. His wife, who was living separate from him, on hearing of this attack, sent medical men to inquire into his state, but they were not allowed to see him, nor was she allowed any communication with him. She thereupon took proceedings in lunacy. The husband in a few months recovered: *Held*, that the wife's costs of the proceedings ought to be paid by the husband. — *In the Matter of F——, an alleged Lunatic*, 89.

2. Where freehold land of a lunatic had been taken by a corporation under the provisions of the Lands Clauses Consolidation Act, and the committee petitioned for leave to convey to the corporation and to have the purchase-money carried over to the credit of the lunacy and invested: *Held*, that the next of kin of the lunatic were proper parties to the application, and that their costs, as well as those of the heir-at-law, must be paid by the corporation. — *In re Briscoe*, 249.

3. Where the next of kin of a lunatic are unknown, a petition in lunacy ought to be served, not on the solicitor to the treasury, but on the Attorney-General.

A sum of stock was standing in the names of G. and H. as trustees for a lunatic. G. died in 1864, and E. was his executor. H. had died long previously, but no such proof of his death as the bank would act upon could be furnished. An order was made under § 22 of the Trustee Act, 1850, appointing the officer of the bank to concur with E. in transferring the stock into Court: *Held*, that such order could not be made on the petition of the committee alone. — *In re John Bourke, B. G. Bourke, and G. Bourke*, 426.

4. A medical gentleman, in whose care a lunatic had been placed, presented a petition during her life for payment out of her estate of the balance claimed to be due to him for her maintenance: *Held*, that an order for that purpose could not be made on his application, but the committee appearing and asking for an inquiry what was due to the petitioner, such inquiry was directed. — *In re Townshend*, 519.

See RESULTING TRUST.

MISJOINDER. See PLEADING, 1.

*MISTAKE. *694

A father and son disentailed the family estate, and resettled it to the use of the father for life, remainder to the son for life, with divers remainders over, the son having a power given him of providing a jointure for his wife and portions for younger children. By a settlement made in contemplation of the marriage of the son, and bearing even date with the resettlement, the son exercised these powers to their full extent. By another deed of the same date, reciting that the son would be entitled to the estates on the death of his father, the son purported to charge the estates with the payment of the further sum of 1200*l.* a year as a jointure for the wife, and the further sum of 10,000*l.* as portions for younger children, the additional jointure to be paid at the same times, in the same manner and with the same powers for its recovery as the original jointure, and the additional portions to be raised at the same time, by the same means, and in the same manner as the original portions. And the son covenanted that as soon as he came into possession he would convey the estates to the trustees of the settlement to such uses, and for such estates for securing the additional jointure and portions as were expressed and contained in the settlement securing for the original jointure and portions: *Held*, that the parties to the last-mentioned deed had no intention to make the additional jointure and portions affect the estates during the life of the son, and that the deed did not affect the son's life-estate, although the holding it not to affect this life-estate made it wholly inoperative. — *Ford* v. *Tynte*, 557.

MORTGAGE (AGREEMENT FOR). See POWER OF SALE, 2.

MORTGAGE BY EXECUTOR. See EXECUTOR.

MORTGAGEE, COSTS OF, IN ADMINISTRATION SUIT. See COSTS, 3.

MORTGAGOR AND MORTGAGEE.

1. Property being put up for sale by a first mortgagee was bought by a second incumbrancer to whom the equity of redemption had been conveyed on trust for sale on default in payment of his debt. This sale having been set aside at the suit of the representative of the mortgagor: *Held*, that the possession of the purchaser was to be referred to the character of trustee, and that the account of the rents received by him was not as of course to be on the footing of wilful neglect and default.

Per the L. J. TURNER. The second incumbrancer, being not an ordinary mortgagee, but a trustee for sale, was incapacitated from purchasing. *Parkinson* v. *Hanbury*, 450.

* 695 2. Where a first mortgagee duly exercises * a power of sale, and a subsequent mortgagee becomes the purchaser, such subsequent mortgagee, in the absence of any thing to impeach the *bona fides* of the transaction, acquires the same irredeemable title as if he were a stranger. — *Shaw* v. *Bunny*, 468.

3. A second mortgagee may purchase from the first mortgagee, selling under his power of sale; and with respect to the question of undervalue, he is in the same position as a stranger.

The circumstance that the second mortgage is in the form of a trust for sale makes no difference.

Nor is it material that the second mortgagee is in possession at the time of the sale. — *Kirkwood* v. *Thompson*, 613.

NECESSARIES. See HUSBAND AND WIFE, 1.

NOTICE.

W., a solicitor, being indebted to E., and being pressed for payment or further security, proposed to give him a second mortgage on the G. estate. This estate had been bought in the name of the plaintiff, who was however only a trustee for W., a fact which did not appear on the deeds. The proposal being acceded to, W. sent to E.'s solicitors the draft of a mortgage-deed, which was in the common form of a mortgage from the plaintiff to E. for money advanced at the time. This draft being approved by E.'s solicitors, the deed was engrossed, and was executed by the plaintiff and handed to W., who delivered it to E., no communication taking place between E. or his solicitors and the plaintiff. The security of the estate having proved deficient, E. sued the plaintiff on the covenant in the deed, and the plaintiff thereupon filed a bill to be relieved, on the ground that he had been defrauded by W. into executing a deed containing a covenant to pay.

Held, that E. was not bound to inquire whether the plaintiff, who was not the real borrower, had agreed to enter into a covenant for payment, and that the frame of the deed did not affect E. with notice of any fraud that might have been practised by W. in inducing the plaintiff to execute such a deed. — *Greenfield* v. *Edwards*, 582.

NUN.

A professed nun, who had taken the vows of poverty and obedience, and had executed a deed assigning all her property to trustees for the benefit of a Roman Catholic ecclesiastical institution, presented a petition, asking for the transfer to the trustees of that deed of a fund in Court to which she was entitled: *Held*, that her being a professed nun did not affect her capacity to take or dispose of property, and that whether the deed was or was not liable to be impeached on the ground of her

* 696 * being, when she executed it, so circumstanced as to be unable to exercise her own free will, the Court could not refuse to order a transfer of the fund to the trustees upon her application. — *In re Metcalfe's Trusts*, 122.

OCCUPANCY. See PARCELS.
ORNAMENTAL TIMBER. See WASTE.

PARCELS.

A shop was demised to H. C., the landlord retaining the right of occupying the flat roof. Shortly afterwards the landlord demised an adjoining house to another person, with the right of walking and sitting on the roof of the shop. H. C.'s lease having determined, the landlord demised the shop to the plaintiff by the description of "all that shop situate at, &c., as the same was late in the occupation of H. C." The lease of the house having afterwards determined, the landlord relet it to the defendant, with the right to occupy the roof of the shop and to erect on it a photographic studio. *Held*, by the Lord Justice TURNER, affirming the decision of Vice-Chancellor WOOD, *dissentiente* the Lord Justice KNIGHT BRUCE, that the words "as the same was late in the occupation of H. C." ought to be considered as inserted only for the purpose of identifying the property, and not of limiting the operation of the deed; that the lease to the plaintiff therefore gave him a right to the occupation of the roof; and that the erection of a photographic studio by the defendant was an unlawful act. — *Martyr* v. *Lawrence*, 261.

PARENT AND CHILD. See PORTIONS. POWER.

PARTIES.

Where a bill by a *cestui que trust* is not confined to seeking relief in respect of a particular breach of trust, but a general account of the trust estate is also sought, the General Order, Consol. Ord. VII. 2, does not dispense with the necessity of all the trustees being represented in the suit. Where, therefore, a bill was filed against a surviving trustee seeking a general account of the trust estate on the footing of wilful neglect and default: *Held*, that the legal personal representatives of a co-trustee who had died shortly before the filing of the bill, after having acted and received assets jointly with the surviving trustee, were necessary parties to the suit. — *Coppard* v. *Allen*, 173.

PARTNERSHIP.

The good-will of a partnership business having been ordered to be sold by the Court in a suit instituted by the surviving partner, it * was directed that the advertisements and particulars of sale * 697 should contain a notice that the sale would not prevent any person theretofore interested in the business from carrying on the like business in the same town. — *Johnson* v. *Helleley*, 446.

PART PERFORMANCE. See VENDOR AND PURCHASER, 1.
PERSONAL ESTATE. See CONVERSION, 2.
PETITION. See LUNACY, 2. RESULTING TRUST.

PLAINTIFF (APPLICATION BY TO STAY PROCEEDINGS). See COSTS, 2.

PLEADING.

1. The plaintiff, by deed reciting a contract for sale by him of certain lands and shares to the defendant, conveyed the land to the defendant in consideration of 20*l*. therein expressed to be paid and of a covenant by the defendant to indemnify the plaintiff against all liability in respect of the shares. The plaintiff afterwards filed his bill, alleging that the deed was executed merely for the purpose of enabling the defendant to manage the property for the plaintiff during his absence from the neighbourhood, and was not intended to give the defendant any beneficial interest; that the 20*l*. had never been paid, and that the plaintiff had subsequently paid calls in respect of the shares, and praying for a reconveyance, or if the Court should be of opinion that the defendant was entitled to the property as purchaser according to the terms of the deed, then that the plaintiff might be declared entitled to a lien for the 20*l*. and the amount of calls paid, and might have relief on that footing: *Held*, by the Lord Justice KNIGHT BRUCE, the Lord Justice TURNER doubting, that the bill was not demurrable, on the ground that it set up two inconsistent cases. — *Davies* v. *Otty*, 238.

2. A bill to restrain a defendant from setting up a certain plea in an action at law, on equitable grounds which the plaintiff might equally have availed himself of at law, is not demurrable merely because it does not go on to pray compensation or any other consequential relief in equity.

A plaintiff who seeks the interference of a Court of Equity is not bound, as the price of such interference, to bring the whole matter into equity. — *Stewart* v. *The Great Western Railway Company and Saunders*, 319.

POLICY OF ASSURANCE.

A policy of life-assurance contained a provision that if the assured should die by his own act the policy should be void, except to the extent
* 698 of any interest acquired therein by * actual assignment by deed for valuable consideration, or as security or indemnity or by virtue of any legal or equitable lien as security for money. The assured assigned this policy by deed by way of mortgage to secure an amount far exceeding the sum assured, the security including also real estates of considerable value. The assured afterwards died by his own hand. The office paid to the mortgagee the sum assured and then filed a bill claiming to have the mortgage debt thrown primarily on the real estate comprised in the security, or at least to have it apportioned between the policy money and the estates according to their values, and to have the whole or the apportioned part of the policy moneys raised out of those estates and repaid: *Held*, affirming the decision of Vice-Chancellor WOOD, that (apart from the question as to the effect of the payment by the office) the office had no equity against the real estates comprised in the mortgage. — *The Solicitors' and General Life Assurance Society* v. *Lamb*, 251.

See HUSBAND AND WIFE, 2. RENEWAL OF LEASEHOLDS.

PORTIONS.

A father, on the marriage of his daughter C. C., covenanted to pay 10,000*l.* three months after demand to trustees, to be held upon trust during the joint lives of the husband and wife to pay 200*l.* a year to the wife as pin-money and the residue of the income to the husband, and after the death of either the whole income to the survivor for life, and after the death of the survivor upon the usual trusts of a marriage settlement for children and issue. The father also covenanted to pay interest till the principal was paid. By his will he gave his residuary estate to trustees in trust to convert it into money, pay thereout his debts and legacies, and stand possessed of the residue as to one moiety upon trust to pay the income to his daughter C. C. for life for her separate use, and after her death, then, if she died in her husband's lifetime, upon trust for such persons other than her husband as she should by will appoint, but if she survived him, for such persons as she should by deed or will appoint, and in default of appointment upon precisely similar trusts for his daughter L. P., with an ultimate limitation, in default of appointment, to his nephew C. B.; and as to the other moiety upon precisely similar trusts, except that the dispositions in favour of L. P. preceded those in favour of C. C. The 10,000*l.* was not paid by the testator in his lifetime: *Held*, by the Lord Justice KNIGHT BRUCE, affirming the decision of Vice-Chancellor WOOD, *dissentiente* the Lord Justice TURNER, that the 10,000*l.* payable under the settlement must be deducted from C. C.'s moiety of the residue.

Held, by the Lord Justice TURNER, that the entire dissimilarity of the trusts of the settlement and will, * and the directions in the will * 699 for payment of debts before the division of the residue into moieties were sufficient to outweigh the leaning of the Court against double portions, and that the 10,000*l.* ought to be paid out of the whole residue, and not out of C. C.'s moiety: and query, whether the first ground alone would not be sufficient. — *Coventry* v. *Chichester*, 336.

POWER.

Parents having a power of appointing an estate to all or any of their children appointed it absolutely to two of their sons, upon the understanding that the appointees should resettle the estate upon certain trusts for the benefit of all the children then living during their respective lives, and subject thereto for the benefit of the children of the sons. This resettlement was made by a contemporaneous deed. *Held*, that the transaction could not be supported by analogy to the common case of an appointment to a daughter in contemplation of her marriage, accompanied by a contemporaneous settlement of the appointed fund, but that the appointment was void in equity, as made upon a bargain for the benefit of persons not objects of the power. — *Pryor* v. *Pryor*, 205.

POWER OF ATTORNEY.

A debtor resident abroad executed a power of attorney authorizing a person in this country to execute a deed of composition with his creditors.

The execution of the power of attorney by the debtor and of the composition deed by the attorney was attested by solicitors.

Held, that the terms of the third rule of the 192d section of the Bankruptcy Act, 1861, had been sufficiently complied with, and that the deed ought to be registered. — *Re Bell*, 672.

POWER OF SALE.

1. A testator devised his real estate to trustees upon trust to sell and to hold the proceeds upon trusts for his children and their issue, subject to a proviso that no sale should be made without the consent of his sons and daughters. The testator left seven children, one of whom, a daughter, afterwards died, and her husband had become absolutely entitled to her share. The trustees, with the consent of the surviving children and of the husband of the deceased daughter, put up the estate for sale.

Held, that the question, whether an effectual sale could be made without consent of all the seven sons and daughters, was too doubtful for the title to be forced upon a purchaser. — *Sykes* v. *Sheard*, 6.

2. A member of a building society received an advance from the funds of the society and deposited the lease of his land with the trustees as security for repayment, at the same time signing an agreement to
* 700 execute a mortgage. He afterwards * executed a mortgage to the trustees containing a power of sale, under which the trustees sold the property for the remainder of the term to the defendants. Previously, however, to the execution of the mortgage the mortgagor assigned the premises, "subject to the mortgage to the building society," to the defendants for valuable consideration, who thereby became possessed of the legal estate.

Held, that the defendants must be taken to have had notice that the mortgage would contain a power of sale, and they were declared to be trustees of the property for the plaintiff. — *Leigh* v. *Lloyd*, 330.

See MORTGAGOR AND MORTGAGEE, 1, 2, 3.

PRACTICE.

1. An application to vacate the enrolment of a decree may be made either to the Lord Chancellor or the Lords Justices.

A decree was passed by the registrar on the 7th of April. According to the usual course, at least one clear day elapses before the decree is given out to the parties as passed and entered, but in cases of urgency it may be bespoken for the following day. The plaintiff's solicitor having notice that the defendants intended to appeal, bespoke the decree for the following day, and at once enrolled it. On the 9th of April, a petition of appeal was presented. *Semble*, that the deviation from the ordinary course of proceeding in obtaining the decree before the usual time would alone have been a sufficient ground for vacating the enrolment. — *Hill* v. *The South Staffordshire Railway Company*, 230.

2. A defendant having filed a written answer, but omitted to file a printed copy, the plaintiff applied for a direction to the clerk of records and writs to give the usual certificate to set down the cause on motion for decree: *Held*, by the Lord Justice TURNER, the Lord Justice KNIGHT BRUCE

doubting, that the plaintiff could not be allowed to waive the filing a printed copy of the answer, and must proceed as if no answer had been filed. — *Bloxsome* v. *Chichester*, 444.

See Costs, 1. Infant, 1. Lunacy, 3, 4. Resulting Trust.

PRINCIPAL AND AGENT. See Account, 1, 2.

PROOF OF DEBTS. See Bankruptcy, 2.

PROSPECTUS. See Company, 2.

PUBLIC COMPANY. See Fraud, 2.

RAILWAY COMPANY. See Injunction, 2.

*RATIFICATION. See Vendor and Purchaser, 1. *701

RECEIVER. See Discretion.

REHEARING AS TO COSTS. See Costs, 1.

REINVESTMENT. See Lands Clauses Act.

RELEASE. See Trustee and Cestui que Trust.

RENEWAL OF LEASEHOLDS.

A testator, entitled to a freehold lease for three lives, was in the habit of insuring each of the lives, and renewing the lease at a fine when a life dropped. By his will he empowered his trustees to pay the premiums, to renew the lease, and to obtain other policies on the new lives on the plan then adopted. Subject as above, he directed his trustees to accumulate the income of his real and personal estate for twenty-one years, and at the end of that period to stand possessed of all the property and accumulations in trust for A. for life, remainder to her children successively in tail. A. had two children, the eldest of whom died an infant in A.'s lifetime, the other was still living. During A.'s life one of the lives dropped; the trustees renewed the lease and insured the new life, after doing which a large surplus of the moneys received on the policy remained in hand. A. having died, the representative of the deceased tenant in tail claimed this surplus and the subsisting policies.

Held, that a valid trust was created for keeping on foot the policies subsisting at the death of the testator, and by means of them renewing the lease and effecting fresh policies on the new lives, and that the personal estate was primarily liable to keep on foot the policies subsisting at the death of the testator, but not the future policies, and that subject to the above trust, the personal estate of the testator vested absolutely in the first tenant in tail, and that her representative was entitled to the surplus of the moneys under the dropped policy, after providing for payment of the future premiums on the two remaining old policies, and paying the expenses of effecting the new policy, but was not entitled to a transfer of the two remaining old policies, for that the moneys to arise from them were primarily liable to the expenses of renewing the lease and obtaining fresh policies. — *Meller* v. *Stanley*, 183.

REPAIRS. See Specific Performance.

RESTRAINT ON ANTICIPATION. See SEPARATE USE.

*702 *RESULTING TRUST.

A married woman, living separate from her husband, invested in the names of her son and daughter moneys arising from savings of her separate estate. The mother died appointing her daughter her executrix. The son having become lunatic, a transfer to the daughter as executrix was ordered on petition without a bill. — *In re De Visme*, 17.

RETURN OF DEPOSIT. See VENDOR AND PURCHASER, 2.

REVERSION. See CONVERSION, 1. EXPECTANT HEIR. HUSBAND AND WIFE, 2.

SALE OF GOOD-WILL. See PARTNERSHIP.

SATISFACTION OF PORTIONS. See PORTIONS.

SCIENTIFIC PERSON.

The report of an expert under 15 & 16 Vict. c. 80, § 42, is not to be looked at in the light of an award, but only as furnishing materials for the information and guidance of the Court. — *Ford* v. *Tynte*, 127.

SCRIP CERTIFICATES. See WINDING UP, 3.

SECURITY (WHETHER SUBSTITUTIONARY OR CUMULATIVE). See EXECUTOR.

SEPARATE USE.

A testator gave his residuary personalty to trustees upon trust during the life of his daughter (a married woman), to pay the income "from time to time when and as the same shall be due and received, but not in the way of anticipation," into the proper hands of the daughter, for her separate use. The residuary estate consisted of a bond debt payable by instalments, and carrying interest which was payable once a-year: *Held*, that, although interest is for many purposes treated as accruing *de die in diem*, the daughter could not effectually assign an apportioned part of the interest for the current year up to the date of the assignment, but could only deal with the interest after it had become payable according to the terms of the bond. — *In re Brettle. Jollands* v. *Burdett*, 79.

SEPARATION (COSTS OF SUIT FOR). See HUSBAND AND WIFE, 1.

SERVICE. See LUNACY, 3.

SETTING ASIDE COMPROMISE. See INFANT, 2.

*703 *SETTLED ACCOUNT. See ACCOUNT, 2, 3.

SETTLEMENT. See CONSTRUCTION, 1. MISTAKE.

SHAREHOLDER.

B. applied for twenty shares in a joint-stock company registered under the Acts of 1856 and 1857, paid a deposit of 10*s*. per share upon them, and signed a letter of application, agreeing to accept the twenty shares or any less number that might be allotted to him. The applications for shares were so few that the company never commenced operations, and after rather more than a year an order was made for winding it up. The directors had retained B.'s deposit and used it, and he had

never applied for the return of it, but no allotment of shares was ever made either to him or to any of the other applicants: *Held*, reversing the order appealed from, that B. was not a contributory. *In re The Adelphi Hotel Company, Limited. Best's Case*, 650.

See COMPANY, 1.

SHOP (COVENANT NOT TO CONVERT PREMISES INTO).

A lease of a house contained a covenant by the lessee to use the house as a private dwelling-house only, provided that if any of the adjoining houses of the lessor should be "converted into a shop," the lessee might "convert the demised premises to a similar use." One of the adjoining houses of the lessor was afterwards let to a photographer, who exhibited photographs outside, and used the ground-floor room for the exhibition of photographs and the sale of albums, cases, and frames, the door being kept open by day, but no alteration was made in the building. *Semble*, that "conversion into a shop" might be effected by user, without any structural alterations of the house, and that there had been such a user of the house for the sale of goods as to be a conversion into a shop within the meaning of the proviso. — *Wilkinson* v. *Rogers*, 62.

SOLICITOR.

The jurisdiction of the Court over solicitors, as officers of the Court, for misconduct, is very special, and will not be exercised on an ordinary summons for taxation of a bill of costs.

On the occasion of the transfer of the securities of first and second mortgagees to a third mortgagee, a sum of money was paid to the solicitor acting on behalf of the first and second mortgagees and the mortgagor on account of his costs, and was added to the mortgage debt. Afterwards he sent in his bill of costs to the third mortgagee, which included charges for business done for the mortgagor, and also for business done for the mortgagees in a common-law Court. The third mortgagee took out a summons for taxation of the bill: * *Held*, that * 704 he could have no relief upon that application either under the Solicitors' Act, or under the general jurisdiction of the Court. — *In re Forsyth*, 509.

SOLICITOR AND CLIENT. See NOTICE.

SPECIFIC PERFORMANCE.

The defendant agreed to grant the plaintiff a lease of a public-house, and to make and form therein a spirit vault, and put in plate-glass windows and do every thing therewith necessary at his own expense, and paint new the outside of all the woodwork, as well as put the slates, chimney pots, and roofing in thorough repair. A decree directing specific performance of the agreement to grant the lease, and directing an inquiry as to damages for the non-performance of the agreement with respect to the vault, windows, painting and repairs, was affirmed on appeal. — *Middleton* v. *Greenwood*, 142.

See VENDOR AND PURCHASER, 1.

STATUTE. See CONSTRUCTION, 2.

STATUTES.
53 Geo. 3, c. 141 (Annuity Act). See ANNUITY ACT.
1 & 2 Vict. c. 43 (Dean Forest). See FOREST OF DEAN.
1 & 2 Vict. c. 110, §§ 12, 14, 18. See JUDGMENT.
8 Vict. c. 18 (Lands Clauses Act), § 69. See LANDS CLAUSES ACT.
8 Vict. c. 18 (Lands Clauses Act), § 80. See LUNACY, 2.
13 & 14 Vict. c. 60 (Trustee Act, 1850), § 22. See LUNACY, 3.
15 & 16 Vict. c. 80 (Masters Abolition Act), § 42. See SCIENTIFIC PERSON.
21 & 22 Vict. c. 27 (Sir H. M. CAIRNS's Act). See FRAUD, 1. INJUNCTION, 1.
24 & 25 Vict. c. 134 (Bankruptcy Act, 1861), § 192. See BANKRUPTCY, 2.
24 & 25 Vict. c. 134 (Bankruptcy Act, 1861), § 192, r. 3. See POWER OF ATTORNEY.
25 & 26 Vict. c. 42 (Mr. Rolt's Act). See FRAUD, 1. INJUNCTION, 1.
25 & 26 Vict. c. 89 (Companies Act, 1862), § 80. See WINDING UP, 1.
STATUTORY POWER. See FRAUD, 2.
STAYING PROCEEDINGS. See COSTS, 2.
SUICIDE. See POLICY OF ASSURANCE.
SUMMARY JURISDICTION OVER SOLICITOR. See SOLICITOR.
SUPPRESSION. See FAMILY ARRANGEMENT.
SURETY. See BANKRUPTCY, 1.
*705 *SURVIVORS. See POWER OF SALE, 1. WILL, 2.
SURVIVORSHIP. See HUSBAND AND WIFE, 2.

TAXATION. See SOLICITOR.
TENANT FOR LIFE. See CONVERSION, 1. WASTE.
THELLUSSON ACT. See CONSTRUCTION, 3.
TIMBER. See WASTE.
TRUST. See CORPORATION.
TRUSTEE. See PARTIES.
TRUSTEE ACT, 1850, § 22. See LUNACY, 3.
TRUSTEE AND CESTUI QUE TRUST.
A trustee holding a fund in trust for three children allowed their father to receive the income of their shares during their respective minorities, considering him to be unable to maintain them. Two of the children attained twenty-one in the father's lifetime, and received their shares of the capital. The father died bequeathing his property to the three children equally, and appointing the trustee his executor. The youngest child attained twenty-one soon after his death, and within a few weeks received her share of the capital of the trust fund, and signed a receipt expressing her approbation of the mode in which the income had been applied during her minority. About half a year afterwards she and her two sisters received their shares of the father's estate and gave a release by deed to the trustees. After this she filed a bill to charge the trustees with the dividends accrued on her share of the trust fund during her minority. *Held*, that after having, with a knowl-

edge of the facts, received from the trustee her share of her father's estate, which was primarily liable to the claim, and given him a release, she could not maintain the claim against him. — *Aveline* v. *Melhuish*, 288.

TRUSTEE (COSTS OF).

1. The official manager of a company made an application in a suit attached to another branch of the Court. The application was refused with costs, and the order refusing it contained a declaration that the costs of the official manager ought not to be paid out of the estate of the company. *Held*, that there was no jurisdiction to make such a declaration, and that it must be struck out, the question whether these costs ought to be allowed out of the estate of the company being for the decision of the Judge to whose Court the * winding-up * 706 was attached. — *Jones* v. *Jones*, 294.

2. In suits against executors by strangers, it is not the course of the Court to insert in the decree a declaration that the costs of the executors are to be allowed out of the testator's estate, and the omission of such a declaration does not amount to a decision that they ought not to be so allowed.

An order on further consideration having been made in an administration suit containing the usual direction for taxing and paying the costs, and costs, charges, and expenses properly incurred, of the executors, the executors claimed under the head of costs, charges, and expenses the costs incurred by them since the decree in the administration suit in unsuccessfully defending a suit in which a decree had been made against them without saying any thing as to their costs. A motion for a direction to the taxing master to review his certificate disallowing these costs having been refused, on the ground that they had been adjudicated upon in the suit in which they had been incurred: *Held*, on appeal, that the motion ought not to have been disposed of on that ground, but that the question whether the costs were costs, charges, and expenses properly incurred ought to have been entered into. — *Graham* v. *Wickham*, 497.

TRUST FOR RENEWAL. See RENEWAL OF LEASEHOLDS.

TRUST FOR SALE. See CONVERSION, 1. MORTGAGOR AND MORTGAGEE, 1, 2, 3.

TRUST RESULTING. See RESULTING TRUST.

UNDUE INFLUENCE. See NUN.

USURY. See EXPECTANT HEIR.

VACATING ENROLMENT. See PRACTICE, 1.

VALUABLE CONSIDERATION. See CONSIDERATION,

VENDOR AND PURCHASER.

1. An agent of a railway company, without any direct authority, agreed to

sell to the plaintiff a piece of land of the company at a certain price per acre. Some of the terms were that the company should lay down a branch railway to the land — that the plaintiff, who was going to erect iron-works on the land, should use the company's railway in preference to others — use it whenever reasonably practicable, and for the longest distance it was reasonably capable of use — and that the traffic to and from the works should be conveyed on the terms of a
* 707 certain prior agreement of the * 8th of May between the parties relating to another piece of land bought by the plaintiff from the company, and the other stipulations of that agreement carried out. The company's surveyor measured the land, the company's engineer laid down the branch railway to it, the plaintiff was let into possession, and his machinery was brought in the company's wagons to the land, and there deposited. After this the company refused to complete the sale. On an appeal from a decree of the Master of the Rolls directing specific performance: —

Held, by the Lord Justice TURNER, *dissentiente* the Lord Justice KNIGHT BRUCE, that the stipulations as to the use of the defendants' railway by the plaintiff did not render a decree for specific performance improper; for that the insertion of a covenant to that effect would effectuate what the parties must be held to have contemplated.

Held, by the Lord Justice TURNER, that although the company's agent contracted without sufficient authority, the company must be held by its acts to have ratified the contract, and that the contract thereby became binding on the company, although not under their common seal, nor executed in any other of the modes mentioned in 7 & 8 Vict. c. 16, § 97, and that specific performance ought to be decreed, especially as possession had been given.

Held, also, by the Lord Justice TURNER, that the fact of no sufficient evidence having been given of the contents of the prior agreement of the 8th of August did not prevent a decree for specific performance, for that where possession has been given under an agreement the Court will, if possible, ascertain the terms of the agreement, and give effect to them.

The doctrine of part performance, as regards incorporated companies, considered.

Per the Lord Justice TURNER. A purchaser's being let into possession is enough to take a contract out of the Statute of Frauds, whether the vendor or the purchaser is seeking specific performance. — *Wilson* v. *The West Hartlepool Railway Company*, 475.

2. A bill by a vendor for specific performance being dismissed, and the purchaser not wishing for an order for return of the deposit, unless it was ordered to be returned with interest: *Held*, by the Lord Justice KNIGHT BRUCE, the Lord Justice TURNER giving no opinion, that the Court ought not to order a return of the deposit, but to leave the purchaser to his remedy at law. — *Rede* v. *Oakes*, 518.

VENTRE SA MERE. See CHILDREN.

VESTING. See CONSTRUCTION, 1.

*VOLUNTARY ASSIGNMENT. *708

A person entitled to an equitable reversionary interest in a sum of stock made a voluntary assignment of it by deed to trustees. No notice was given of this deed either to the trustees named in it, or to any person interested under it, or to the original trustees of the stock; the assignor retained the deed and subsequently destroyed it, and made a different disposition by will of the fund, which was still standing in the names of the original trustees: *Held*, that unless the deed could be successfully impeached on the ground of fraud, mistake, or surprise, it operated as an effectual disposition of the fund, notwithstanding the absence of notice and the retention and destruction of the deed by the assignor. — *In re Way's Trusts*, 365.

VOLUNTARY WINDING UP. See WINDING UP, 2.

WASTE.

What a prudent owner would do in the proper course of management is no measure of what a tenant for life without impeachment of waste may do as to cutting timber planted or left standing for ornament.

Halliwell v. *Phillips*, 4 Jur. (N. S.) 607, observed upon.

Form of inquiry as to cutting ornamental timber. — *Ford* v. *Tynte*, 127.

WILFUL DEFAULT. See ANNULLING BANKRUPTCY. MORTGAGOR AND MORTGAGEE, 1.

WILL.

1. A testator gave his residuary estate in trust for his wife for life, and after her death he directed that one-sixth of the fund should be held in trust to pay the income to his daughter H. R. for life, and after her death for her children, who being a son or sons should attain twenty-one, or being a daughter or daughters attain that age or marry. He gave other shares upon similar trusts for others of his children by name and their children respectively. The will contained a proviso that if any of his said children should die without having any child who under the above trust should become absolutely entitled to a share of the trust fund, then as well the original share thereby given as also the share accruing under the proviso to each child whose issue should so fail and his or her children or child, should go to the survivors or survivor of the testator's said children, and if more than one in equal shares during their respective lives, and after their respective deaths the said shares to be respectively transmitted to such their respective children or child as thereinbefore expressed with respect to their original shares.

H. R. was living at the date of *the will, but died childless in the *709 testator's lifetime: *Held*, that her share was not undisposed of, but that the gift over in the proviso took effect. — *Rackham* v. *De la Mare*, 74.

2. A testator gave real estate to his wife for life, and directed that after her death it should be divided, share and share alike, amongst twelve persons mentioned by name, "or the survivors of them." All those persons survived the testator, but some of them died before the widow: *Held*, that the rule laid down in *Cripps* v. *Wolcott*, 4 Mad. 11, applies to real as well as personal estate, and that the estate belonged to such of the twelve persons as survived the tenant for life. — *In re Gregson's Estate*, 428.

3. A testator gave the proceeds of the sale of his real estates after the determination of certain life-estates "to such person or persons as shall at that time be the nearest in blood to me, as descendants from my great-grandfather J. S., and whose kindred with me originates from him." At the date of the will the only lineal descendants of J. S. were the testator and his sister, a lady above sixty years of age: *Held*, by the Lord Justice TURNER, affirming a decree of the Master of the Rolls, the Lord Justice KNIGHT BRUCE dissenting, that the objects of gift were such persons as were nearest in blood to the testator out of a class composed both of the descendants of J. S. and of the persons whose kindred with the testator originated from their being related to J. S. — *Best* v. *Stonehewer*, 537.

See CONSTRUCTION, 3.

WILL (SUIT TO SET ASIDE). See FRAUD, 1.

WINDING UP.

1. An order for winding up a company on the application of a creditor, on the ground that the company has not paid the petitioner his debt within twenty-one days after notice requiring payment (under 25 & 26 Vict. c. 89, § 80), will not be made unless the twenty-one days have elapsed before the petition is presented.

Per the Lord Justice TURNER. Attempts to enforce, by means of a winding-up petition, the payment of a debt, the liability to which is *bond fide* disputed by the company, are not to be encouraged, and *semble*, in such a case the petition ought be ordered to stand over till the debt is established. — *In re The Catholic Publishing and Bookselling Company, Limited*, 116.

2. The shareholders in a mining company within the jurisdiction of the Stannaries passed a resolution for a voluntary winding-up of the company, and appointed two liquidators. A creditor presented a petition for a compulsory winding-up, upon which the Vice-Warden made an order
*710 directing the voluntary * winding-up to continue under the supervision of the Court, and substituting a new liquidator for one of those appointed by the resolution: *Held*, by the Lord Justice KNIGHT BRUCE, the Lord Justice TURNER doubting, that the Vice-Warden had jurisdiction to remove the liquidator appointed by the shareholders. — *In re The Old Wheal Neptune Mining Company (Limited). Ex parte Pulbrook. Ex parte Rawlings*, 348.

3. The transferee of scrip certificates transferable by delivery, which entitled

the holder to become a shareholder in respect of the shares therein mentioned, and in the mean time to receive dividends, petitioned for the winding-up of the company: *Held*, by the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls (the Lord Justice TURNER dissenting), that the petitioner admitting himself to be a contributory and undertaking to do all acts necessary to make himself a shareholder, a winding-up order might be made on his petition. — *In re Littlehampton, &c., Company (Limited)*, 521.

See CONTRIBUTORY, 1, 2.

WRITTEN ANSWER. See PRACTICE, 2.

END OF THE SECOND VOLUME.

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